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No. 401

Supreme Court of the United States

OCTOBER TERM 1935

UNITED STATES OF AMERICA, *Petitioner*

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE

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On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

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BRIEF OF AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed by the American Farm Bureau Federation as amicus curiae. The Federation is an organization incorporated under the laws of Illinois to promote, protect, and represent the business, economic, social, and educational interests of the farmers of the nation and to develop agriculture. There are affiliated in the Federation

approximately 36 State and 1300 county farm bureaus and the Associated Women of the American Farm Bureau Federation. The farm bureaus are organizations of farmers with membership generally on a family basis.

The interest of the Federation in the pending litigation lies in the fact that a large number of its farmer members hold contracts with the Government in connection with surplus control programs pursuant to the Agricultural Adjustment Act and, pursuant to such contracts, receive rental and benefit payments from the Government payable in large part out of appropriations measured by the proceeds of the processing taxes whose constitutionality is at issue in this litigation; that the prices received by members of the American Farm Bureau Federation for agricultural commodities produced by them are directly affected by the imposition of the processing taxes and the operations under the Agricultural Adjustment Act; and that the Federation has repeatedly endorsed the legislation and its administration and is of the opinion, as shown by its official acts and resolutions, that the legislation, including the processing tax, is essential to a sound program for the rehabilitation of agriculture in the nation. The membership of the farm bureaus has as extensive an interest in the Act, even if measured solely by pecuniary standards, as have the processors subject to the taxes. For these reasons the American Farm Bureau Federation has filed this brief as amicus curiae.

SCOPE OF BRIEF

Cotton is the only commodity involved in the Government's claims for processing taxes which the respondents prayed be disallowed. These processing taxes were imposed prior to the recent amendments to the Agricultural Adjustment Act. The Act (section 14) provides that—

> "If any provision of this title is declared unconstitutional, or the applicability thereof to any * * * cir-

> cumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other * * * circumstances, or commodities shall not be affected thereby."

It is submitted that even a decision adverse to the Government would not necessarily affect the validity of the Act as applied to commodities other than cotton. The separability clause in question is not in the form commonly found in Acts of Congress. Its very uniqueness of form (particularly its reference to "commodity") indicates that it was included after full Congressional consideration; that it is intended to produce precisely the result stated. The processing taxes on commodities other than cotton introduce in substantial degree legal considerations differing from those present in the cotton processing tax. This brief, therefore, is confined to the constitutionality of the Agricultural Adjustment Act as applied to processing taxes on cotton, imposed prior to the recent amendments to the Act.

Also, this brief relates only to processing taxes and not to floor stock taxes. The processing tax is fundamental, in the view of amicus curiae, to sound financing of surplus control programs under the Act. The floor stock tax is necessary and proper to prevent evasion of the processing tax through abnormal accumulation of stocks of processed commodities on distributors' floors prior to commencement of the processing tax and abnormal depletion of such stocks prior to termination of the tax. The floor stock tax is fair and reasonable as an effort to prevent unfair competitive situations arising among processors and distributors immediately following commencement or termination of the processing tax. Nevertheless, the floor stock tax, while important, is an incidental and not a fundamental feature of the Act. This brief by amicus curiae is, in consequence, confined to the constitutional issues affecting the processing tax.

JURISDICTION, STATEMENT OF FACTS, AND STATUTES INVOLVED

For the purposes of this brief, amicus curiae adopts the statements found in the brief for the United States with respect to the opinions below, the jurisdiction of this Court, the question presented, the statutes involved, the facts, the specification of errors to be urged, and the scope of the Agricultural Adjustment Act. The statutes involved, however, are also set forth in Appendix I, pages 118 to 131 of this brief.

SUMMARY OF LEGISLATIVE HISTORY

The Agricultural Adjustment Act in its present form is the outgrowth of practically constant investigation, deliberation, and action by Congress over more than a decade. It is believed that few measures upon the statute books today are founded upon such intensive and mature legislative consideration. The legislative history of the Agricultural Adjustment Act is pertinent to the consideration of certain of the constitutional questions at issue. The official documents comprising this legislative history, setting forth the Congressional hearings and investigations, the committee reports, the debates in either House, and the several bills in their various parliamentary stages, are documents of which this Court may take judicial notice. That history, however, is not confined to the Congressional action during the 73rd Congress. The present Act was developed as the result of affirmative legislative action involving extensive deliberations over the period of eleven years from 1924 to 1935. Not only the 73rd Congress but also the 68th, 69th, 70th, 71st, 72nd, and 74th Congresses are each partly responsible for the development of the legislation in its present form. The provisions of the present Act resulted from legislative hearings and investigations conducted during the earlier Congresses. Some of the more recent hearings were referred to in the committee reports

upon the Act. The constitutional issues involved in the present Act, such as taxation for the general welfare, will be found to have been considered in detail by committees in reports upon the legislation in its earlier forms. Often the substance, and occasionally the precise language of the present Act, as, for instance, portions of that relating to the processing taxes, will be found to have first been the subject of legislative action during an earlier Congress and to have been discussed in the committee reports at the time.

During the period from 1924 to 1933, measures involving the basic principle of the Agricultural Adjustment Act—that is, removal of the disparity between the price levels of farm and industrial products through some method of control over surplus production of farm products—were reported by the House Committee on Agriculture on eight occasions and by the Senate Committee on Agriculture and Forestry on ten; rejected by the House twice and then passed by it five times; rejected by the Senate twice and passed by it four times; passed by the Congress four times; vetoed by President Coolidge twice (First and Second McNary-Haugen bills); and approved by President Hoover once (Farm Board Act) and by President Roosevelt once (Agricultural Adjustment Act). During that period, one such measure that had been placed on the statute books (the Farm Board Act) was found inadequate and repealed.[1] During that period, a large amount of supplemental legislation in the fields of agricultural credits and mortgages, cooperative marketing, seed loans, increased agricultural tariffs, stimulation of new uses for farm products, and the like[2] was enacted as helpful in meeting the situation but never regarded as an adequate legislative solution of the more fundamental problem of the disparity between agricultural and industrial prices. From 1922 to

[1] Certain loan provisions, not here pertinent, were allowed to remain in effect.

[2] For many of these, see "Laws Relating to Agriculture", compiled by Elmer A. Lewis, Document Room, House of Representatives, 1935.

1933 there were conducted 20 major legislative hearings and investigations to the end of devising legislative remedies for such price disparity. Finally, since 1933, the original Agricultural Adjustment Act has not only been amended from time to time but at the last session of Congress it was further considered, reaffirmed as to its basic principles, and extensively amended as to its details.

To facilitate the consideration of the legislative history of the Act there is set forth in Appendix II a brief summary of the various bills which obtained favorable committee action and the various committee reports, hearings, and investigations thereon.

A review of the legislative history shows that the original surplus control proposal was introduced in Congress early in 1924. In reporting the legislation the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry made numerous, elaborate findings with reference to the depression in agriculture and its causes and consequences. (H. Rept. 631, 68th Cong., 1st Sess.; S. Rept. 410, 68th Cong., 1st Sess.) A succinct statement of similar findings is that made by the House committee at the time of reporting the National Emergency Bill (H. R. 13991, 72nd Cong., 2nd Sess.) on January 3, 1933. (H. Rept. 1816, pp. 1-2) This bill was passed by the House and reported to the Senate in the session immediately preceding the enactment of the Agricultural Adjustment Act and but a few weeks before the consideration by Congress of that Act was begun. The National Emergency Bill provided processing taxes and obviously served as a model for the Agricultural Adjustment Act, the very language being followed in some instances. The findings of the House committee at the time of its report on the National Emergency Bill were embodied in the following statement:

> "No discussion is necessary to establish the fact that there exists in this country a condition of economic maladjustment and that this condition is in sub-

stantial measure attributable to the discriminations from which agriculture has suffered for many years past. Prices for all farm products average today about half what they were before the World War. Since the pre-war period wheat has suffered a loss of approximately 65 per cent of its purchasing power, cotton 53 per cent of its purchasing power, tobacco 19 per cent of its purchasing power, and hogs 59 per cent of their purchasing power. On the other hand, taxes on agricultural lands have since the pre-war period increased approximately 150 per cent and farm indebtedness has increased approximately a like percentage. Agricultural freight rates are more than 50 per cent in excess of pre-war freight rates.

"We produce surpluses of cotton, wheat, and a number of other major farm commodities. No direct tariff can place such commodities on a basis of equality with industrial products that for many years have had the benefit of tariff protection. Agricultural tariffs have almost without exception proved ineffective. Yet tariff rates on industrial articles which the farmer buys, and the cost of such articles to him, have greatly advanced. The result has been that the producers of agricultural commodities must bear the burden of the tariff without receiving its advantages. While the average price of farm products has decreased 46 per cent since the war, the prices of industrial articles bought by the farmer has increased as much as 58 per cent during the postwar period, and even during the present year ranged from 106 to 117½ per cent of pre-war prices. Thus the farmer's dollar has less than half its pre-war value.

"Because of these various disparities, the farmer's purchasing power for clothing, lumber, hardware, machinery, and the like is less than half normal. Lack of agricultural purchasing power is responsible directly and indirectly for more than 6,000,000 of the unemployed, according to expert testimony before the committee. (See hearings, pp. 360-361.) It is not claimed that the farmer's situation is any more desperate than that of the unemployed in the city, save for the fact that discriminations against the farmer have been continuous through the past two decades while the depression as to industry and labor, in general, has pre-

> vailed for only the past three years. It is believed, however, that the elimination of the price disparity between agriculture and industry and the bringing about of a better balance in national purchasing power will greatly reduce the number of unemployed, will aid in reestablishing the purchasing power of labor and other consumers, as well as of agriculture, and will be an effective measure toward meeting the present national emergency." [Pp. 1-2]

Other findings of fact, far more extensive than those just quoted, as to the gravity of the agricultural situation and its causes, made by the agricultural committees of the two Houses, are to be found in H. Rept. 1595, 68th Cong., 2nd Sess.; H. Rept. 1003, 69th Cong., 1st Sess.; H. Rept. 1790, 69th Cong., 2nd Sess.; H. Rept. 1141, 70th Cong., 1st Sess.; S. Rept. 664, 69th Cong., 1st Sess.; and S. Rept. 1304, 69th Cong., 2nd Sess.

For this disparity between industrial and agricultural prices the remedy originally proposed by the committees (H. R. 9033 and S. 3091, 68th Cong., 1st Sess.) was control of the surplus production of farm crops over domestic needs and elimination of the effect of such surpluses upon domestic price levels. This control was to be exercised by diverting surplus agricultural products, in raw or processed form, to foreign markets at world prices. This result was to be accomplished by establishing a Government corporation to purchase certain basic agricultural commodities at their "ratio" or "parity" price (substantially equivalent to the "fair exchange value" of the present Act) and removing them from domestic markets through sales abroad in amounts sufficient to keep the domestic price level for such basic commodities at a parity with industrial prices. The desired price level was to be arrived at statistically, on the basis of price indices already maintained by the Government departments by comparing the pre-war farm price for cotton and the pre-war wholesale price for all commodities with the current

farm price for cotton and the current wholesale price for all commodities.

Tariff protection for agricultural commodities would become effective through removal of surpluses thereof from the domestic market. Increases of existing tariffs and embargoes upon agricultural imports were authorized where necessary to protect the new domestic price level.

To meet losses suffered by the corporation in purchasing an agricultural commodity at the domestic price and selling it abroad at the world price and to cover its administrative expenses, the bill required the payment by the producer of an equalization fee (the precursor of the present processing tax) to the corporation upon the first sale of the commodity. The fee was authorized to be fixed in an amount sufficient to meet such losses and expenses, thereby prorating equally among all producers of the commodity the costs of the marketing operations and services furnished, irrespective of whether the produce of the particular farmer was disposed of upon the domestic or foreign market.

This original legislative proposal embodied the basic principle now found in the Agricultural Adjustment Act, with modifications only as to detail and mechanics and method of administration. This principle is the control of surplus production of farm products to the end of establishing a parity between agricultural and industrial prices. In later forms the proposed legislation placed supervision of the surplus control program first in a Federal Farm Board and then in the Department of Agriculture, rather than in a Government corporation. Also, with the loss of our foreign markets through the world depression, foreign trade restrictions, and high domestic tariffs (see "World Trade Barriers in Relation to American Agriculture", S. Doc. 70, 73rd Cong., 1st Sess.; "Operation of Rates in the Emergency Tariff Act", S. Doc. 224, 67th Cong., 2nd Sess.; "Economic Analysis of Foreign Trade of the United States", S. Doc. 180, Part I, 72nd Cong., 2nd

Sess.), opposition expressed by the agricultural committees of the two Houses to reduction of production ceased, and emphasis was placed in these later forms of the proposed legislation upon prevention of the creation of domestic surpluses of farm products, either (1) through payments for reduction of acreage or production, or (2) by payments of benefits upon the "domestic allotment" of crops but denying such payments upon surplus production in excess of domestic needs. Diversion to foreign markets of surpluses after they had come into existence continued as a part of the program but in a less important role. In consequence, it is found that the Agricultural Adjustment Act makes available funds not only for removal of surpluses of agricultural products and expansion of markets therefor (section 12(b)) but also for payments for reduction of acreage or production (section 8(1)) and for payment of benefits upon that portion of a crop (the domestic allotment) required for domestic consumption (section 8(1)).

In addition, under the original proposal, "the commodity was to bear the cost" through the equalization fee levied upon the first sale of the commodity for processing. The Treasury was not to bear the cost. Despite demands within Congress and legislative proposals to the effect that the farm and surplus control programs should be subsidized from general funds in the Treasury (see, for example, the following bills in the 69th Congress, 2nd Session: H. R. 15963 (Crisp bill), H. R. 15655 (Aswell bill), and S. 5088 (Curtis bill)), the committees of Congress and the farm organizations held to the principle that the cost should be financed through special levies, and Congress agreed. (See H. Rept. 1790, 69th Cong., 2nd Sess., pp. 2-4; S. Rept. 1304, 69th Cong., 2nd Sess., pp. 30-32) This principle as to financing remained a part of the surplus control legislation efforts until the Farm Board Act of the 71st Congress, when it was abandoned at the insistence of those who advocated direct appropriations from time to time

from the Treasury as preferable to the more permanent equalization fee. Under the Farm Board Act, a half-billion dollar appropriation was made from the Treasury without provision for additional taxes to reimburse the Treasury. However, in the Agricultural Adjustment Act, in order to provide a balanced budget so far as the agricultural program was concerned, the earlier plan was again resorted to and a tax upon the processing of agricultural commodities was enacted to raise the necessary revenue for the Treasury. This processing tax still involves the original principle that the commodities shall pay the cost by reimbursing the general funds of the Treasury and that the surplus control programs shall not be the cause of an unbalanced budget.

SUMMARY OF ARGUMENT

The processing tax under the Agricultural Adjustment Act is a uniform excise tax. Considering the tax apart from the expenditures under the Act (the amount of which is in general measured by the amount of the proceeds of the processing tax), the tax does not violate the due process clause of the Fifth Amendment or infringe upon powers reserved to the States by the Tenth Amendment. The tax is a revenue measure. Its rate, method of computation, and method of collection are reasonable and there is a reasonable classification of the subject matters taxed. The tax is not for a private purpose for, as subsequently argued, it is a tax to provide for the general welfare. The tax itself has no substantial effect upon production. The substantial effect of the Act upon production is achieved through the expenditure of the appropriations under the Act.

The processing tax is not invalid by reason of the appropriation or expenditure provisions of the Act. The expenditures have in fact been made from general funds in the Treasury. Respondents have no greater interest in the expenditures under the Act than have other taxpayers, and

that interest is insufficient to permit respondents to litigate the validity of the appropriation and expenditure provisions or the validity of the tax as affected by those provisions.

The expenditures are made "in consequence of appropriations made by law", and the appropriation provisions do not constitute a violation of Article I, Section 9, Clause 7, of the Constitution. Permanent indefinite appropriations are valid under that clause, and numerous legislative precedents since the early Congresses are in accord with this view.

The processing tax is a tax to provide for the general welfare of the United States. The general welfare clause is a limitation upon the taxing power and the question of whether a tax is for the general welfare is to be tested by the use made of the proceeds of the tax. A tax that provides for the general welfare is also one that provides for a public purpose. In order for a tax to be one for the general welfare its proceeds need not be expended only for carrying out the purpose of one of the enumerated powers of Congress other than the taxing power. The question of what is general welfare is one for Congress primarily to determine. The courts will not substitute their judgment for that of Congress if Congress might reasonably have concluded from the legislative record before it that the expenditures would promote the general welfare.

Protective tariff duties are excise taxes having the same objectives as the processing tax. Each promotes the general welfare in the same respects. Each produces revenue (more in the case of the processing tax) and, in addition, each is intended to aid in establishing higher price levels for domestic products. The protective tariff duties accomplish this through imposition or, more often, threat of imposition of the tax; the processing tax through expenditure of an amount measured by the proceeds thereof. The mechanism of the protective tariff tax is effective for domestic products of which no surplus is produced; but must

be supplemented by the processing tax in case of domestic products of which a surplus is produced.

The cod fishery bounties enacted by the 1st Congress as a part of the first protective tariff Act are a contemporaneous legislative exposition of the Constitution to the effect that bounties are an appropriate means of providing for the general welfare, particularly with respect to those industries suffering from the disadvantages of the protective tariff system.

Congress, after exhaustive hearings and investigations from 1922 to 1933, found that measures to control surplus production of agricultural commodities were for the general welfare inasmuch as they would benefit not only agriculture but also business, labor, and the consumer. Congress also found that, in order to avoid an unbalanced budget, it was for the general welfare that the costs of carrying out such measures should be financed through special levies. These findings of Congress are not arbitrary.

The expenditure provisions do not violate the Tenth Amendment. The expenditure provisions involve no "regulation" of production. The Act is purely voluntary, and the individual farmer is free to accept or reject its benefits. This has proved true in practice. The right of the States to control local affairs is not infringed. The fact that Congress does not have general regulatory control over production does not make unconstitutional a law otherwise valid which attempts, through voluntary means only, to attain, in the interest of the general welfare, restricted crop production.

The processing tax provisions do not involve an unconstitutional delegation of legislative power. Even assuming *arguendo* such an improper delegation, the contention of improper delegation of legislative power becomes immaterial by reason of the legalization and ratification provisions recently enacted by Congress. These provisions do not attempt to ratify an unconstitutional delegation of legislative power nor any other act which Congress could

not have authorized. Congress ratified only the acts of executive officers in determining a rate of tax and assessing and collecting the amount thereof under color of law.

However, irrespective of the legalization and ratification provisions, there is no unlawful delegation of legislative power. The rate of tax is fixed by a simple mathematical formula based upon accurate statistical data collected independently of the Agricultural Adjustment Act. The factors governing the rate of tax are capable of more precise ascertainment than cost of production or similar factors involved in our tariff and internal revenue laws. The provisions authorizing adjustments in the processing tax rates as fixed by the formula involve no improper delegation of legislative authority. In addition, they have never come into operation, are separable, and are not essential to the administration of the Act.

The time at which the tax takes effect is automatic. It depends upon the existence of a proclamation of the Secretary of Agriculture to the effect that expenditures for rental or benefit payments will be made with respect to a commodity. The power of expenditure is an inherent executive power subject only to such restrictions as are imposed by the appropriation. Exercise of the executive power of expenditure involves no delegation of any kind of power, nor does the making of the effective date of the tax automatically contingent upon an exercise of the executive power of expenditure involve delegation of power.

The fact that the time the tax takes effect is also conditioned upon the ascertainment by the Secretary of Agriculture of the marketing year for a commodity involves no improper delegation of legislative power. It is merely the ascertainment of a well-known trade fact.

ARGUMENT

I

The Tax Upon Processing of Cotton is a Valid Excise Tax

The Act provides (section 9(a)) that "The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor". In the case of cotton, processing is defined (section 9(d)(2)) as the "spinning, manufacturing, or other processing (except ginning) of cotton".

1. The tax is an excise tax.

The processing tax is a tax on the exercise of a particular right to property, the right to manufacture. It is not a tax on the cotton. The tax is, in terms, upon manufacturing and, in addition, upon spinning and processing, which are but special forms of manufacturing. Such a tax is an excise and need not be apportioned.[3] (*Ex parte Kollock,* (1897) 165 U. S. 526; *Patton* v. *Brady,* (1902) 184 U. S. 608; *McCray* v. *United States,* (1904) 195 U. S. 27; *Bromley* v. *McCaughn,* (1929) 280 U. S. 124)

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[3] In the Circuit Court of Appeals it was urged by counsel for the respondents in the instant case that the decision in *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* (1921) 255 U. S. 288, controls. There an "annual license tax" of 50 cents a gallon imposed by the State of Kentucky upon all whiskey, either withdrawn from bond or transferred in bond from Kentucky to a point outside the State, was held invalid by this Court under the State constitution. Possession of the whiskey for any purpose could not be obtained, nor any possessory right therein exercised, unless the tax had been paid. This Court found the tax to be not a license or occupation tax but a tax by reason of ownership of the whiskey, a tax on property. It is argued, therefore, that the processing tax is a tax on property and a direct tax required to be apportioned. In view of the decisions above cited holding a tax on the right to manufacture to be an excise tax, and in view of the fact that the nature of the tax in *Dawson* v. *Kentucky Distilleries & Warehouse Company* is so clearly distinguishable, that case does not merit further discussion here.

In *Knowlton* v. *Moore,* (1900) 178 U. S. 41, this Court said—

> "Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. * * *" [P. 88]

Congress itself regards the tax as an excise. In the report of the House Committee on Agriculture the Committee said—

> "The bill, however, makes provision for raising additional revenues for the Treasury that it is believed will more than equal any expenditures resulting from operation of the act. Such revenues will be obtained, in the main, from manufacturers' excise or processing taxes subsequently discussed." [H. Rept. 6, 73rd Cong., 1st Sess., p. 3]

2. The tax is uniform.

The processing tax is levied upon all spinning, manufacturing, or other processing wherever it occurs throughout the United States, irrespective of geographical considerations. The requirement of uniformity for excise taxes is no more than a requirement that the tax "operate generally throughout the United States", wherever the subject matter is found. Intrinsic uniformity is not required. (*Knowlton* v. *Moore,* (1900) 178 U. S. 41; *Patton* v. *Brady,* (1902) 184 U. S. 608; *Billings* v. *United States,* (1914) 232 U. S. 261; *La Belle Iron Works* v. *United States,* (1921) 256 U. S. 377; *Bromley* v. *McCaughn,* (1929) 280 U. S. 124)[4]

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[4] "*Regional Classifications*"—In the Circuit Court of Appeals it was urged by counsel for respondents in the instant case that the tax is lacking in uniformity by reason of the provisions of section 11 of the Act, which define "basic agricultural commodity" as meaning a prescribed list of commodities "and any regional or market classification, type, or grade" of any basic agricultural commodity. This reference in the statute to regional classifications of commodities in no wise relates to the general operation of the processing tax throughout the United States once it is imposed. The cotton processing

3. The tax does not violate the due process clause of the Fifth Amendment.

For the purposes of the discussion under this heading, the question of the validity of the processing tax is to be sharply distinguished from the question of the validity of the use of the tax proceeds or the effect of the use of such proceeds on the validity of the tax itself. The question of

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tax operates upon all cotton processed throughout the United States. There are no regional classifications, types, or grades for cotton nor has the Secretary recognized any such classification, type, or grade for cotton. It is time enough to raise this question when a regional processing tax is levied under color of the Act. (See *Hicklin* v. *Coney*, (1933) 290 U. S. 169)

However, the words "regional classification" are not an attempt to provide for a non-uniform tax but are a recognition of well-understood trade facts with regard to the production and distribution of tobacco. (See, for example, statement of House Committee on Agriculture in H. Rept. 1273, 70th Cong., 1st Sess., p. 34) There are seven regional or market classifications and 26 regional or market types of tobacco. (Classification of Leaf Tobacco Covering Classes, Types, and Groups of Grades, Service and Regulatory Announcement, Bureau of Agricultural Economics, U. S. Dept. of Agriculture, No. 118, issued November 1929, pursuant to the Tobacco Stocks and Standards Act, 45 Stat. 1079, amended 47 Stat. 669)

Agricultural experience has shown that each type is usually capable of successful production only in a particular region. Such a well-known type, for instance, as Burley tobacco can be successfully grown only in central and northeastern Kentucky, southern Ohio, southern Indiana, western West Virginia, central and eastern Tennessee, and sections of Virginia, North Carolina, Missouri, and Arkansas. Such a type has therefore come to have a regional significance and to be known as a "regional type". Further, some classes and types are used for cigarettes, some for cigar fillers, some for cigar wrappers, some for export, and some for other uses. More especially surplus production may exist as to one type and not as to another, and surpluses in one class or type will not substantially affect marketing conditions as to another type. From the standpoint of methods of production, price, uses, and characteristics, and for the purposes of the Act, the various classes and types of tobacco constitute separate commodities and require individual surplus control programs. (Report of the Agricultural Adjustment Administration for May, 1933-February, 1934, entitled "Agricultural Adjustment", p. 70)

It is therefore wholly reasonable for Congress to recognize in the Act regional or market classifications and types of commodities. That recognition in no wise affects the uniformity of an excise tax once it is levied upon any particular class or type. The processing tax on Burley tobacco, for instance, is levied on that tobacco wherever processed throughout the United States. Congress is not required to select subjects for taxation that exist uniformly in the several States.

the validity of the statutory provisions providing for expenditures under the Act and the effect of such expenditure provisions upon the validity of the tax itself are discussed later in this brief. (See pages 28 to 92)

(a) THE TAX IS A REVENUE MEASURE.

Considering the tax separately from the expenditures, there can be no reasonable doubt that the object sought to be attained by the taxing provisions of the Act is revenue. Congress, in the Act itself, states that the processing tax is levied "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency" (section 9(a)) and makes substantially the same statement in the title of the Act. The House committee, in its report, stated that the processing taxes are levied "In order to provide additional revenues for the Government". (H. Rept. 6, 73rd Cong., 1st Sess., p. 5) There is no suggestion in the legislative history of the Act that the processing tax itself, as distinguished from the expenditure of its proceeds, has any purpose other than a revenue purpose or that the processing tax provisions were enacted as a guise for reaching objectives other than the production of revenue.

Further, the processing tax provisions and the operation of the tax itself have all the indicia of genuine tax provisions. These provisions originated in the House in accordance with the constitutional requirement. The tax is collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and paid into the Treasury. (Sec. 19(a)) The tax is collected subject to the same administrative and judicial procedure and remedies as other like internal revenue taxes. All provisions of law applicable to the sales taxes imposed by section 600 of the Revenue Act of 1926 apply to the processing tax, including the provisions of section 626 of the Revenue Act of 1932, relating to returns, due date, and interest on de-

linquencies. (Sec. 19(b)) Provision is made for refunds. (Sec. 12) Exports are exempt. (Sec. 17(a)) Finally, the tax is productive of substantial revenues. Thus, up to September 30, 1935, the total tax collections pursuant to the provisions of the Agricultural Adjustment Act amounted to $933,825,150.03,[5] of which amount the processing taxes accounted for over 87 per cent, a percentage which will increase by reason of the non-recurrence of the floor stock taxes. The y sources of tax revenue producing greater returns are ome taxes.

The proce sing tax provisions having a legitimate object—namely, that of revenue—the further question arises whether the provisions are "unreasonable, arbitrary or capricious" and therefore lacking in due process.

(b) THE TAX IS REASONABLE.

(1) The tax rate is not confiscatory.—The amount of consumption of all kinds of cotton in the United States for each marketing year (i. e., August 1 to July 31) from 1929 to 1935 shows that the rate of consumption during the two years in which the processing tax has been in effect compares favorably with that for the years when the processing tax was not in effect. Thus, in the marketing years 1933-1934 and 1934-1935 there were consumed approximately 5,700,000 and 5,360,000 running bales, respectively. Equivalent figures for the marketing years 1929-1930, 1930-1931, 1931-1932, and 1932-1933 show consumption of approximately 6,106,000, 5,263,000, 4,866,000, and 6,137,000 running bales, respectively.[6]

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[5] See "Internal Revenue Collections Fiscal Year 1935", preliminary statement issued July 31, 1935, p. 6; Mimeographed comparative statement of internal revenue collections for the months of July, August, and September, 1935, issued August 21, September 20, and October 18, respectively.

[6] See the following publications of the Bureau of Census, Department of Commerce: "Cotton Production and Distribution", Bulletin 171, issued 1934; August report of cotton consumed, etc., preliminary report issued September 14, 1935.

Further, the amount of processing tax paid with respect to the cotton contained in representative retail cotton articles is far below any point where this Court could say that the business of the cotton processor was being confiscated through inability to market his products by reason of the increased cost attributable to the tax. For instance, the processing of a bleached 81x99 inches sheet results in a processing tax of 7.7 cents; a yard of bleached muslin, 1.4 cents; a 54x60 inches table cloth, 5.3 cents; a dozen napkins, 3.8 cents; overalls, 8.3 cents; a chambray shirt, 0.3 cents; carded yarn men's socks, 0.4 cents; woman's house dress, 3.4 cents; and combed yarn women's hose, 0.6 cents.[7] The Agricultural Adjustment Administration estimates that the net increase in consumers' total retail expenditures attributable to processing tax collections for 1934 probably amounts to less than 1 per cent.[8]

(2) *Method of collection of the tax is reasonable.*— The method of collection of the tax is the same as that for many other internal revenue taxes. In addition, however, recognizing that the processor usually obtains funds for the payment of the processing tax from the sales of the processed articles, Congress made adequate provision to avoid harsh results in connection with the collection of the tax. The statement of the House Committee on Agriculture commenting upon section 19(b) and (c) of the Act is an accurate analysis of the pertinent statutory provisions. Not only does the processor have from one to two months before the return is required to be filed and the tax paid[9] but, as the House committee stated in its report—

> "In order to prevent undue hardship upon processors, the Secretary of the Treasury is authorized to permit

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[7] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 69. See also statement of House Committee on Agriculture, H. Rept. 6, 73rd Cong., 1st Sess., p. 7.

[8] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 239.

[9] Regulations 81 Relating to Processing Tax and Compensating Tax, Bureau of Internal Revenue, Treasury Department, Arts. 11 and 12.

> postponement for a period not exceeding 60 days of the payment of taxes. Further, the processor, in those exceptional cases where a longer period is required before his products are sold and paid for following processing, is made eligible for loans from the Reconstruction Finance Corporation in order to finance the payment of the taxes pending receipts from his sales. These provisions will tend to enable processors to build up stocks and to make more liquid the flow of commodities in the usual marketing channels." [H. Rept. 6, 73rd Cong., 1st Sess., p. 6]

Furthermore, in the case of cotton, the Act, as amended May 17, 1935, provides that the processing tax shall be payable not upon the filing of the return, but 90 days thereafter, and that the Secretary of the Treasury may extend the time for such payment up to six months from the date of the return. (Public No. 62, 74th Cong., 1st Sess., Sec. 2)

(3) *Method of computing the rate of tax is reasonable.*— The amount of the processing tax with respect to cotton equals the difference between the fair exchange value of cotton and the current average farm price for cotton at the time the particular rate of tax is imposed. (Sec. 9(b)) It is expressed in terms of cents per pound of cotton processed. Not only is this method of measurement not lacking in due process as being unreasonable, arbitrary, or capricious but, on the contrary, it is further evidence of the revenue character of the tax provisions and of their reasonableness. As set forth above in this brief (pages 10 to 11), it was the purpose of the Congress that the surplus control program should be self-sustaining, that the legislation should provide, roughly, enough revenue to carry out the programs, and that the programs should not be carried out with funds from then existing sources of revenue and thereby become the cause of an unbalanced budget. As stated by the House Committee on Agriculture in its report, "The bill, however, makes provision for raising additional

revenue for the Treasury that it is believed will more than equal any expenditures resulting from operation of the act".[10] The same committee, in its report upon the bill during the preceding session of Congress, stated—

> "An important feature of the measure is that it is self-supporting. Amounts sufficient to pay the benefits to producers provided for in the bill are to be realized from the adjustment charges to be paid on the processing of the commodities covered, * * *
>
> "The adjustment charge to be collected on processing is to be in an amount equal to the difference between the price paid producers at local markets and the pre-war or fair exchange value of the commodity; * * *"[11]

Any attempt by Congress to assure itself of sufficient revenue before authorizing a new type of expenditure—i. e., to produce a balanced budget—has usually been regarded as at least a reasonable aim. This Court itself has said "Taxation may run *pari passu* with expenditure". (*Patton* v. *Brady*, (1902) 184 U. S. 608, 620) The provisions of the Agricultural Adjustment Act are one instance of the substantial achievement of such an aim.

The Act is intended to establish an equality of industrial and agricultural prices or, in the words of the Act, to give the farmer "a fair exchange value" for his products. The expenditures under the Act of processing tax proceeds or an equivalent amount is intended to result in such increase in the price being received by the farmer for his cotton at the time the cotton program is commenced that such original farm price, plus the increase therein and the rental or benefit payments made to the farmer, will approximate a fair exchange value for his cotton. Similarly, the amount of the tax is fixed at this difference between the

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[10] H. Rept. 6, 73rd Cong., 1st Sess., p. 3.

[11] H. Rept. 1816, 72nd Cong., 2nd Sess., pp. 5-6. For similar statement by the Senate Committee on Agriculture and Forestry, see S. Rept. 1251, 72nd Cong., 2nd Sess., p. 3.

original farm price and the fair exchange value. Thus, the amount of the cotton processing tax is measured by the same difference in cotton price levels as the expenditures measured by its proceeds are intended to eliminate. If the Act is successful in operation, the Congressional objective is accomplished by expenditures limited to an amount measured by the processing tax proceeds and a balanced budget results so far as the operations under the Act are concerned. Expenditures have in fact to date approximated the processing tax receipts.[12]

Usually, the particular tax receipts which pay immediately or eventually for a new subject of Congressional expenditure are necessarily concealed among the many sources of Treasury income from taxes, bond issues, and other sources. In the Agricultural Adjustment Act the source of the receipts to meet the expenditure is disclosed. The necessary revenue is provided in the same Act which authorizes the expenditures. Were such a result compulsory under the Constitution in all instances, unnecessary expenditures would tend to be discouraged and taxpayers benefited. Certainly, the due process clause does not prohibit a rate of tax measured approximately by the expenditures to be made nor does it prohibit the disclosure of this fact on the face of the statute and compel the incurring of Treasury deficits or the enacting in separate legislation of revenue provisions adequate to meet the expenditures.

(c) THERE IS A REASONABLE CLASSIFICATION OF SUBJECT MATTERS TAXED.

Congress may make any reasonable classification of subject matters to be taxed. It has wide discretion in this matter so long as the classification is not purely arbitrary. It

[12] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 304; "Financial Statement with respect to the Cotton Program as of August 31, 1935", publication of Department of Agriculture, Agricultural Adjustment Administration, issued October 25, 1935.

is not restrained as to a particular group of commodities or of persons to be affected by a tax or the particular activities or property uses to be taxed, so long as its action is not capricious and the tax is not an unapportioned direct tax. A tax levied upon processing, which is one use of a commodity, i. e., its conversion from one form to another through a manufacturing process, is not an arbitrary selection of the point of imposition for an excise tax.

The selection of basic commodities such as wheat, cotton, field corn, hogs, rice, tobacco, and milk (section 11) is obviously a selection of those commodities as to which the quantity of the commodity and the amount thereof processed is so large that substantial revenues are likely to be produced. Particularly does the selection become appropriate when it is of the same commodities with respect to which Congress provides for surplus control programs under the Act. The principle that "the commodity shall pay the cost", referred to earlier in this brief (pages 10-11), is a reasonable basis for selection of the objects with respect to which the tax is to be imposed. It is the principle that the consumer of a product is not entitled to low prices, or the distributor thereof to increased profits, at the expense of a fair price to the farmer. The consumer should pay for the commodity a price sufficient to enable the farmer to obtain a fair price. As stated by the House Committee on Agriculture in its report—

> "In the long run, consumers can not expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity. The ultimate danger to the consumer in the present extremely low prices for agricultural products is that, if continued, they will shortly result in the ruin of our agriculture and it will eventually be necessary to pay unduly higher prices before it can be restored. The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between production and consumption that will restore to agricultural

commodities their pre-war purchasing power. The present economic emergency is in large part the result of the impoverished condition of agriculture and the lack of ability of farmers to purchase industrial commodities. * * *" [H. Rept. 6, 73rd Cong., 1st Sess., p. 7]

(d) THE TAX DOES NOT CONSTITUTE A TAKING OF PROPERTY FOR A PRIVATE PURPOSE.

Respondents urge that the tax is a taking of private property for an ostensible public purpose without just compensation and in fact is a taking for a private and not a public purpose, in violation of the Fifth Amendment. (R. 7, Par. 10 and R. 6, Par. 4)

As to this contention, it suffices to say that no excise tax constitutes a taking of property within the meaning of that clause of the Fifth Amendment which provides "nor shall private property be taken for public use, without just compensation". To hold otherwise would nullify the Federal power of taxation.

Further, the contention does not present a question with reference to the tax as such, considered apart from the expenditure of the tax proceeds. It presents a question to be tested by the purpose of the expenditures. Thus, in *Magnano Co.* v. *Hamilton,* (1934) 292 U. S. 40, this Court had before it an excise tax of 15 cents per pound levied by the State of Washington on all butter substitutes sold within the State. Mr. Justice Sutherland in delivering the opinion of the Court said—

"That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class. * * *" [P. 43]

Therefore, the question whether the tax is for a public purpose is argued later in this brief (pages 36-40) in connection with the discussion of the effect of the expenditure provisions upon the validity of the tax.

4. The tax does not violate the Tenth Amendment.

In the opinion of the Circuit Court of Appeals it is stated that the processing tax constitutes a regulation of production and is therefore a violation of the Tenth Amendment. (R. 33-49) It is submitted that such conclusion again involves confusion of the question of the validity of the tax with the validity of the expenditure of the proceeds of the tax and the effect of such expenditures upon the validity of the tax. The processing tax itself does not regulate production of cotton any more than the manufacturers' excise tax on automobile tires regulates the production of the cotton that goes into the tires. The effect of the tax itself upon production is purely incidental. The substantial effect of the Act upon production is achieved through the expenditure of an amount measured by the proceeds of the tax. The validity of such expenditures and of the tax in the light of such expenditures is discussed later in this brief (pages 33-92).

It is true that the point of imposition of the tax, i. e., processing or manufacturing, is a subject matter generally within the regulatory authority of the States and not of the Congress. But Congress in selecting the point of imposition of a tax is not limited by the Tenth Amendment or other constitutional restrictions upon its regulatory powers. A tax may fall upon matters which are beyond the power of Congress to regulate under the commerce clause or under its other enumerated powers.

The processing tax is not invalid in that its imposition or threat of imposition amounts to a regulation of manufacture. While the tax is imposed on processing or manufacturing, the imposition or threat of imposition of the tax,

as distinguished from the expenditure of its proceeds, has no effect not usual in the case of excise taxes. In fact, the effects of the processing tax are not as burdensome as those of many excise taxes heretofore held valid by this Court. The processing tax does not have the prohibitory effect of the tax on oleomargarine sustained in *McCray* v. *United States,* (1904) 195 U. S. 27, nor the regulatory consequences of the tax with respect to narcotics sustained in *United States* v. *Doremus,* (1919) 249 U. S. 86, and *Alston* v. *United States,* (1927) 274 U. S. 289. The processing tax does not vary with variations of the laws of the several States as did the tax sustained in *Knowlton* v. *Moore,* (1900) 178 U. S. 41. The processing tax is not necessarily absorbed by the processor but may be passed on to the consumer or back to the producer, which is more than was claimed by the payors of the tax on sales of commodities upon exchanges sustained in *Nicol* v. *Ames,* (1899) 173 U. S. 509. In so far as the processing tax is passed on to the consumer, it does not differ in effect from the tariff duties sustained as an exercise of the taxing power of Congress in *J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394. A collateral intent, even if present, would not invalidate the tax. (*Magnano Co.* v. *Hamilton,* (1934) 292 U. S. 40, and cases there cited)

This case is unlike the *Child Labor Tax Case,* (1922) 259 U. S. 20, and *Hill* v. *Wallace,* (1922) 259 U. S. 44. The incidental effects of the processing tax flow solely from its imposition upon processing and involve no regulation of production. The effect upon production follows from expenditures measured by the proceeds of the tax and not from the tax as such. The purpose of the tax is not to regulate. It has not the quality of a penalty for violation of a prescribed course of conduct. Scienter is not an element of the tax. The imposition of the tax or the threat of its imposition results in no action of a regulatory character. Its purpose is revenue, and any other effect it has is only that usual and normal to a moderate excise tax

imposed upon manufacturing. As to the statutes involved in the *Child Labor Tax Case* and *Hill* v. *Wallace* the purpose of Congress would have been most effectively accomplished if the taxes imposed had produced no revenue. That is not true of the processing taxes. With them, the more the revenue the better the Congressional purpose is effectuated.

II

The Processing Tax is Not Invalid by Reason of the Appropriation and Expenditure Provisions of the Act

1. The appropriation is a valid appropriation under Article I, Section 9, Clause 7, of the Constitution.

The Constitution provides in Article I, Section 9, Clause 7, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law". The respondents in their first report to the District Court of the United States (R. 5, Par. 8) apparently urged that the appropriation provisions of the Agricultural Adjustment Act are invalid by reason of the constitutional provision above quoted. In addition to the appropriation of moneys in the Treasury from sources other than the processing tax, the Agricultural Adjustment Act as originally enacted provided that—

> "the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of

any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection." [Sec. 12(b)]

Under section 12(b), as amended August 24, 1935, the processing tax proceeds are not appropriated but are covered into the general funds of the Treasury, and a sum equal to the proceeds derived from the processing and other taxes under the Act is appropriated. The text of section 12(b) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935, is as follows:

"(b) In addition to the foregoing, for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from all taxes imposed under this title is hereby appropriated to be available to the Secretary of Agriculture for (1) the acquisition of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to cooperate with a program of production adjustment or marketing adjustment adopted under the authority of this title, and (2) the following purposes under part 2 of this title: Administrative expenses, payments authorized to be made under section 8, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

(a) RESPONDENTS HAVE INSUFFICIENT JUSTICIABLE INTEREST TO LITIGATE THE QUESTION.

The prayer of the respondents in this case is that certain claims of the United States for processing and floor

stock taxes be disallowed. The respondents have no direct interest in the appropriation provisions of the Act as such but only in so far as those appropriation provisions may affect the validity of the tax. Whether or not the appropriation is made in accordance with the constitutional requirement cited above can not affect the validity of the tax. The constitutional requirement is a mandate directed exclusively to officers of the Government charged with the custody and disbursement of Government moneys. (*Collins* v. *United States,* (1879) 15 C. Cls. 22) The legislation governing the duties of the Comptroller General of the United States and the rules of the respective Houses governing the functions of those several committees having jurisdiction over expenditures in the executive departments (Manual, U. S. Senate, Standing Rule XXV; Manual, House of Representatives, Rules of the House, Rule XI, Pars. 36-46) provide adequate safeguards to assure that public moneys are expended only pursuant to appropriations made by law and that those officers charged with the custody and disbursement of public moneys are faithfully observing the constitutional mandate. The respondents have no interest sufficient to require adjudication by the courts of the question whether the expenditures made by the Secretary of Agriculture under the Act are "in consequence of appropriations made by law". (*Frothingham* v. *Mellon,* (1923) 262 U. S. 447).

(b) A PERMANENT INDEFINITE APPROPRIATION IS VALID.

Moreover, the expenditures of the Secretary of Agriculture under the Act are made "in consequence of appropriations made by law". It is not denied by respondents that the expenditures of the Secretary of Agriculture are made pursuant to the statutory provision above quoted with reference to appropriations. While amicus curiae is not aware of any judicial decisions on the point, legislative practice well demonstrates that an appropriation by Act of Con-

gress in the terms set forth in section 12(b) of the Act is an appropriation made by law in conformity with the constitutional requirement.

An appropriation may be permanent, except for the specific constitutional limitation of two years upon funds appropriated for raising and supporting armies. (Constitution, Art. I, Sec. 8, Clause 12) The amount of an appropriation may be specific or indefinite. It may be payable from general funds of the Treasury, from a special fund composed of certain receipts specifically set aside by law and dedicated for expenditure for a specific purpose, from a trust fund, or from a contributed fund from private or non-Federal sources.[13] The appropriations made by section 12(b) of the Act are permanent, indefinite appropriations from general funds in the Treasury.

Permanent appropriations have been a common legislative practice for more than 130 years. With respect to permanent appropriations of the various types, the Subcommittee of the House Committee on Appropriations in charge of Permanent Appropriations in the 73rd Congress said—

> "However, from the modest beginning of the Act of 1798, the practice [i. e., of permanent appropriations] has grown until at the present time the Committee has uncovered 370 items of this character in our laws calling for, and permitting, without any scrutiny by this or any other Congress, the estimated expenditures of $2,304,784,450 for the fiscal year 1935, as disclosed in the budget."[14].

In the print of the hearings conducted by that subcommittee in 1934 there are listed some 27 pages of various types of permanent appropriations.[15] Certainly such a practice, which has continued throughout our constitutional

[13] See analysis made by Subcommittee of the House Committee on Appropriations in Charge of Permanent Appropriations in hearings before the subcommittee, 73rd Cong., 2nd Sess., entitled "Permanent Appropriations".

[14] Id., p. 1.

[15] Id., pp. 962-989.

history, can not be said at this late date to be in violation of a constitutional requirement which imposes no limitation upon the form in which appropriations may be made. While the subcommittee complained of the "usurpation", through permanent appropriations made by prior Congresses, of the right of later Congresses to exercise control over current appropriations as well as to follow up their judicious expenditure, the subcommittee admitted that permanent appropriations were in "technical" compliance with the constitutional provision.[16]

Whatever may be the propriety of the subcommittee's position as a matter of legislative policy, such permanent appropriations, whether specific or indefinite and whether from general, special, or other funds, are not in violation of the constitutional requirement. Such appropriations have no binding effect upon subsequent Congresses and do not constitute an usurpation.[17] Each Congress is free to

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[16] Id., p. 1.

[17] The statement of the Senate Committee on Appropriations is more accurate (S. Rept. 1195, 73rd Cong., 2nd Sess.):

> "The present method of handling these permanent annual appropriations is only through their submission in the annual Budget. This does not result in any material degree of publicity or careful scrutiny." [P. 2]

In the 52nd Congress the House Committee on Appropriations made the following statement with respect to the extent and effects of the practice:

> "It will be observed that the tendency to increase the number of permanent appropriations is of decided growth in comparatively recent times. It serves executive convenience to escape the task of annual discussions to procure estimates, and it lessens public scrutiny to afford this relief. Stability for certain payments is sought by this means; but it takes from the country and from Congress the habit of voluntarily providing yearly for those obligations which most strongly appeal to the debt-paying sentiment. In the great increase of public business Congress seems to vibrate between a disposition to retain full scrutiny of the public business and a desire to escape some of the annual labor involved." [H. Rept. 2610, 52nd Cong., 2nd Sess., p. 2]

This committee of the 52nd Congress made an extensive investigation of permanent indefinite appropriations and finally reported legislation repealing some but retaining others of such appropriations.

exercise such supervision and control over them as it sees fit. In fact, the subcommittee in question ultimately exercised such supervision and control by reporting the Permanent Appropriation Repeal Act, 1934, which repealed many, but not all, of such appropriations. (48 Stat. 1224) Obviously, the subcommittee did not find itself bound by Acts of prior Congresses. The appropriation for the Agricultural Adjustment Administration here in question was one of those brought specifically to the attention of the subcommittee but not repealed by Congress in that legislation.[18]

2. The tax is a tax to provide for the general welfare of the United States.

(a) RESPONDENTS HAVE INSUFFICIENT JUSTICIABLE INTEREST TO LITIGATE THE QUESTION.

Respondents have no justiciable interest sufficient to require the courts to adjudicate the constitutional validity of the appropriation and expenditure provisions of the Act. Respondents are burdened by the tax, not the expenditure of the proceeds of the tax, and then only if they absorb the

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[18] When the item of processing taxes under the Agricultural Adjustment Act was reached during the discussion at the hearings, the chairman of the subcommittee made the following statement:

> "Item no. 116 on our agenda deals with the processing tax under the Agricultural Adjustment Administration Act. The Budget for 1935 carries an estimate of $831,022,428. This legislation is not permanent in its nature, and the subcommittee in charge of appropriations for the Department of Agriculture has given an extensive hearing on this item for the fiscal year 1935. We will not enter into any discussion of this item in our hearings." [Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, in Charge of Permanent Appropriations, entitled "Permanent Appropriations", 73rd Cong., 2nd Sess., p. 88]

In stating that the legislation was not permanent, the chairman of the subcommittee had reference to the provisions of section 13 of the Agricultural Adjustment Act, which give to the Act a temporary character. The appropriation, however, is a permanent appropriation, not renewed annually, and endures without further action by Congress so long as the Act remains in effect.

tax and do not pass it on. Nor is the extent of the respondents' interest altered because under the original Act the processing tax proceeds were segregated in a special fund in the Treasury and appropriated for the purposes enumerated in section 12(b) of the Act. Even under the original Act, any moneys in the Treasury, irrespective of their source, were made available for such purposes pursuant to joint estimates of the Secretary of Agriculture and the Secretary of the Treasury. (Sec. 12(b)) Not only the corporation for which the respondents are receivers but other processors and all taxpayers are similarly situated as to the extent of their interest in expenditures for surplus control programs. Under the amended Act (section 12(b)) the appropriation is made exclusively from general funds in the Treasury.

Usually, expenditures during any marketing year for a particular surplus control program occur earlier than the payment into the Treasury of the larger part of the receipts from the processing tax for that marketing year. To meet this situation, Congress provided, even in the case of the original Act, for an appropriation from the general funds of the Treasury to be expended by the Secretary of Agriculture pursuant to the joint estimate. The Treasury general funds are then reimbursed for these advances as the payments of the processing taxes later flow in.

According to the latest figures available, figures as of August 31, 1935, actually all the receipts of the processing taxes upon cotton, in the amount of $242,270,781.78, have been used to reimburse the Treasury for advances from the general funds of the Treasury made for rental and benefit payments under the cotton programs and for administrative expenses and processing tax refunds.[19] Thus, the expenditures under the Act to date have, in fact, been made directly from general funds of the Treasury.

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[19] See publication of the Department of Agriculture, Agricultural Adjustment Administration, entitled "Statement Showing Status of Cotton Program as of August 31, 1935", issued November, 1935.

Further, Government expenditures must be met from moneys in the Treasury. What particular source of receipts supplies the funds for the particular expenditure is of little importance. If the Congress had directed that the proceeds of the processing taxes be used to defray the general expenses of the Government and that the proceeds from postal receipts or from repayment of Government loans be used to pay the expenses under the Agricultural Adjustment Act, the situation would differ no whit, from a Federal budgetary standpoint, and it would be clear that the respondents would have no justiciable interest in the expenditures. Is this situation altered because Congress saw fit to measure the appropriations and expenditures under the Act by the amount of proceeds from the processing taxes, thereby keeping a balanced budget so far as surplus control programs are concerned?

Finally, respondents have not as yet paid their processing taxes. Congress has already, by amendment of the Act, changed the disposition of the processing tax proceeds so that they are no longer appropriated for rental and benefit payments and other expenditures under the Act but are covered into the Treasury as part of the general funds and serve merely as a measure for appropriations made from the general funds of the Treasury. It still lies within the power of Congress, before the processing tax payments of the respondents are made, again to change the disposition to be made of the proceeds.

It is submitted that the respondents have no greater justiciable interest in the expenditures under the Act than other taxpayers and that the decision of this Court in *Frothingham v. Mellon,* (1923) 262 U. S. 447, denies to the respondents any right to have adjudicated the constitutional validity of the expenditures or the validity of the tax as affected by the validity of expenditures. In that case, Mr. Justice Sutherland said—

> "The administration of any statute likely to produce additional taxation to be imposed upon a vast

> number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. * * *" [P. 487]

For this Court to enable taxpayers to have adjudicated the validity of the processing tax as affected by the expenditures under this Act, would mean that the payors of a tax may question the validity of Government expenditures in each instance where Congress by way of limitation measures particular expenditures by particular receipts. In addition, it should be pointed out that the sum of one hundred million dollars from general funds in the Treasury not otherwise appropriated is also available for payments in connection with cotton surplus control programs. (Sec. 12(a))

However, irrespective of the contention set forth above, it is the position of amicus curiae that the taxes fall within the general welfare limitation.

(b) IN FEDERAL TAXATION PUBLIC PURPOSE IS COVERED BY THE GENERAL WELFARE LIMITATION.

It has been previously set forth in this brief (page 25) that any question of public purpose is a question not of the tax as such but of the use to be made of its proceeds. In the case of Federal taxes, however, the question of public purpose is but part of the question as to whether the tax is levied to provide for the general welfare. The Constitution does not provide that Federal taxes be levied for a public purpose. It provides that—

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *"[Art. I, Sec. 8, Clause 1]

It is recognized that this Court, having regard to the use made of the revenues, has invalidated State taxation for a private purpose without reference to a specific constitutional prohibition. (*Citizens' Savings & Loan Association, etc.* v. *Topeka,* (1875) 20 Wall. 655; *City of Parkersburg* v. *Brown,* (1883) 106 U. S. 487; *Cole* v. *City of La Grange,* (1885) 113 U. S. 1) More recently, however, this necessity for restriction of State taxation to public purposes has been rested upon the limitations of the due process clause of the Fourteenth Amendment. (*Green* v. *Frazier,* (1920) 253 U. S. 233) On the other hand, with respect to Federal taxation, this Court has made no corresponding decision under the Fifth Amendment. To the contrary, the history of the sugar bounty litigation shows that the validity or invalidity of Federal taxation, having regard to the objects of expenditure, rests upon the constitutional provision quoted above.

The sugar bounty litigation.—The Tariff Act of October 1, 1890, provided for a bounty payable to manufacturers or refiners of sugar. (26 Stat. 567) In order to be entitled to the bounty, the manufacturer or refiner of sugar had to receive from the Commissioner of Internal Revenue a license to produce sugar and give bond conditioned upon the observance of certain rules and regulations. The bounty was payable directly from the Treasury of the United States.

In the case of *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649, the unconstitutionality of the Tariff Act of 1890 as a whole was urged upon several grounds. One of these grounds was that the sugar bounty provisions of that Act were unconstitutional. This Court, however, declined to decide the question as to the constitutionality of those provisions because, in its opinion, the rest of the Act would be valid even if the bounty provisions were void.

The Tariff Act of August 27, 1894, repealed the sugar bounty provisions and made it unlawful to issue any license

or to pay any bounty for the production of sugar under those provisions. (28 Stat. 509)

In the case of *United States ex rel the Miles Planting and Manufacturing Co.* v. *Carlisle,* 5 Apps. D. C. 138, decided January 8, 1895, there was presented an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition for writ of mandamus to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to issue to the relator a license for the manufacture of sugar and to certify the amount earned by him under the sugar bounty provisions. The Court of Appeals of the District of Columbia first held that the sugar bounty provisions had been repealed by the Tariff Act of 1894 and that no rights had been reserved to the relator by the repealing Act. The court discussed by way of dictum the constitutionality of the sugar bounty provisions and declared them to be unconstitutional. A majority of the three judges held that the bounty provisions necessarily involved the power of taxation for the reason that the bounty was paid out of revenue raised by general taxation, that taxes for a sugar bounty were for a private and not a public purpose, and that the levying of taxes for a private purpose was beyond the power of Congress. The chief justice concurred in the decision of the court but declared that the discussion of the constitutional question was unnecessary for the purposes of the case.

The Sundry Civil Expenses Appropriation Act for 1896, approved March 2, 1895, made appropriations sufficient (1) to pay the unsatisfied bounty claims of manufacturers and refiners of sugar produced by them previous to the repeal of the sugar bounty provisions, and (2) to pay the claims of manufacturers and refiners who had produced sugar during the fiscal year 1896 but subsequent to the repeal of the sugar bounty provisions and who had in due time made application for a license to produce or would

have been entitled to the license had the sugar bounty provisions not been repealed.[20] (28 Stat. 910, 933)

A few months later there arose in the Federal Circuit Court for the Eastern District of Louisiana two cases, *United States* v. *Realty Company* and *United States* v. *Gay*. These cases involved claims against the United States for the payment of moneys appropriated for sugar bounty claims under the Sundry Civil Expenses Appropriation Act. The circuit court rendered judgment in favor of the plaintiffs. The cases were taken by writ of error to this Court. This Court affirmed the judgments of the circuit court. ((1896) 163 U. S. 427) It was held unnecessary in the proceeding before this Court to decide whether or not the bounty provisions of the Tariff Act of 1890 were constitutional, but this Court did decide that it was entirely within the constitutional power of Congress to make the appropriations for the relief of sugar manufacturers and refiners as provided in the Sundry Civil Expenses Appro-

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[20] In *In re Sugar Bounty*, 2 Comp. Treas. Dec. 98, decided September 4, 1895, there was presented for consideration the certificate of the Auditor of the Treasury Department allowing a claim under the sugar bounty appropriation provisions of the Sundry Civil Expenses Appropriation Act. The Comptroller of the Treasury had without question paid all bounty claims arising under the original sugar bounty provisions. In view of the decision of the Court of Appeals of the District of Columbia, however, the Comptroller found it necessary to consider the constitutionality of the sugar claims appropriation provisions in the Sundry Civil Expenses Appropriation Act, in order to determine whether he should refuse payment of all claims thereunder on the ground of the unconstitutionality of the provisions. The Comptroller in an extensive opinion held (1) that he was empowered to decide constitutional questions; (2) that the original sugar bounty provisions were unconstitutional on the same grounds as set forth by the Court of Appeals of the District of Columbia; and (3) that, therefore, the appropriation provisions of the Sundry Civil Expenses Appropriation Act, being directed to the same end, were equally unconstitutional. The Comptroller, however, did not disallow the payments but, under sections 1063 and 1064 of the Revised Statutes, certified the constitutional questions to the Court of Claims for the decision of that court. Before the questions certified to the Court of Claims by the Comptroller of the Treasury were decided by that court, the Federal Circuit Court for the Eastern District of Louisiana rendered decisions in the cases of *United States* v. *Realty Company* and *United States* v. *Gay*, which were taken up to the United States Supreme Court. (See main text of brief above)

priation Act. The opinion established the following: (1) That, inasmuch as Congress had power to lay and collect taxes "to pay the debts" of the United States, it also had the power to appropriate the moneys raised for the same object; (2) that the power to pay debts of the United States was not confined to debts of a strictly legal character that could be enforced in a court of law but included debts or claims that rested upon merely equitable or moral obligations; (3) that such debts could arise out of an Act of Congress and reliance thereon even if the Act were entirely unconstitutional; and (4) that such a claim and the appropriating of moneys for its payment can "rarely, if ever" be the subject of review by the judicial branch of the Government.

Despite the fact that throughout the sugar bounty litigation the validity of the original sugar bounty provisions and of the Sundry Civil Expenses Appropriation Act was argued and decided below on the basis of public versus private purpose, the decision of this Court in the *Realty Company* case was rested not upon the Fifth Amendment or public or private purpose but upon Article I, Section 8, Clause 1, of the Constitution. So, in the instant case, it follows that the validity of the processing taxes, having regard to their objects of expenditure, should be determined with reference to the same constitutional provision and not with reference to the Fifth Amendment. The question before this Court, assuming *arguendo* that respondents may raise it, is whether the processing tax is one to provide for the general welfare of the United States. That being once decided, any question as to whether the tax by reason of the expenditure of its proceeds is for a private purpose and, in consequence, in violation of the Fifth Amendment is thereby likewise decided. A tax that provides for the general welfare is for a public, not a private, purpose.

(c) THE GENERAL WELFARE CLAUSE IS A LIMITATION ON THE FEDERAL TAXING POWER.

The general welfare clause is contained in the same constitutional provision that gives Congress the power to levy taxes. That provision of the Constitution states that—

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *" [Art. I, Sec. 8, Clause 1]

Three views have existed as to the construction of the general welfare clause:

The first view is that it is an independent grant of power to provide for the general welfare irrespective of the taxing powers or other enumerated powers.[21] This view is not urged by amicus curiae and is not necessary to the constitutional validity of the processing taxes.

The second view is that held by Hamilton. This view is set forth more fully below in this brief (pp. 58-59) in the quoted extracts of the argument upon the constitutional validity of pecuniary bounties, made by him in his Report on Manufactures. It was the view urged by members of the 2nd Congress in connection with the debate

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[21] That view, while not novel, has recently been vigorously urged. An example is the speech of Representative David J. Lewis upon the Sisson Resolution asking the House of Representatives to seek the advice of its Committee on the Judiciary as to whether the legislative power of Congress extends to the enactment of laws making provision for the general welfare of the United States and to insure the domestic tranquility. (Cong. Rec., daily ed., July 1, 1935, Appendix pp. 10975, 10979-10980) Representative Lewis' position is that the desk copy of General Washington, the President of the Constitutional Convention, showed a semicolon after the word "excises" and not a comma; that the copy was the one read and approved by the members of the Convention; that an error was made in substituting a comma for the semicolon by the copyist to whom it was turned over for writing out on parchment for engrossment; and that such an error is not binding in ascertaining the true text of the Constitution. For additional arguments supporting this view see J. F. Lawson's "The General Welfare Clause", and E. S. Corwin's "The Twilight of the Supreme Court", pp. 152-154 and footnotes thereto.

upon the cod fishery bounties enacted by that Congress. It was also adopted by Justice Story in his "Commentaries on the Constitution", Vol. I, 5th ed., secs. 912-913. Essentially, the view is that the general welfare clause is a limitation on the taxing power; that general welfare embraces matters other than those as to which Congress is given administrative or regulatory authority by other enumerated powers; that Congress may levy taxes to raise funds to be expended in providing for the general welfare subject only to the limitation that the object be general, not local, and that its operation extends, in fact or by possibility, throughout the Union and is not confined to a particular spot.

The third view is that held by Madison and set forth in this brief (pp. 62-63) in connection with the discussion of his argument on the constitutional validity of the Massachusetts cod fishery bounties enacted by the 2nd Congress. Madison, like Hamilton, held that the general welfare clause was a limitation on the taxing power but concluded that the general welfare embraced only those objects that came within the administrative or regulatory authority conferred upon Congress by the enumerated powers other than the taxing power. As will be set forth below in this brief, Madison, at the time of advancing this theory, voted for the Massachusetts cod fishery bounties but on the theory, which is scarcely borne out by the facts, that the bounty was in furtherance of the enumerated powers with respect to commerce and national defense.

Amicus curiae here urges the intermediate view held by Hamilton. This view falls within a literal application of the language of the constitutional provision, including its punctuation in the form in which it was adopted by the several States. It does no violence to the plain language of the Constitution and involves no additional grant of authority or limitation upon authority which, as in the other two views, may be founded only upon the failure to apply the constitutional language as plainly written.

The general welfare clause seems rather obviously to have been drawn from the Articles of Confederation. Article VIII of the Articles of Confederation provides—

> "All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states * * *"

The change made by the Constitution was not in the objects of appropriation but in the method by which the moneys were to be raised. Direct taxation was substituted for requisitions on the several States. Madison, in the debate on the cod fishery bounties in the 2nd Congress, after setting forth that "general welfare" was not a novel term but one repeatedly found in the old Articles of Confederation, asked the rhetorical question as to whether gentlemen ever supposed or suspected that Congress could give away the moneys of the States in bounties, to encourage agriculture or for any other purpose they pleased. (Pages 62-63, below) At a later date, however, Madison admitted that the practice under the Articles of Confederation had been in accord with Hamilton's view. In his letter to Andrew Stevenson of November 27, 1830, Madison wrote—

> "If the *practice* [italicized in original] of the Revolutionary Congress be pleaded in opposition to this view [the Madisonian view] of the case, the plea is met by the notoriety that on several accounts the practice of that Body is not the expositor of the 'Articles of Confederation.' These articles were not in force till they were finally ratified by Maryland in 1781. Prior to that event, the power of Congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the States. After that event, habit and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority; which was the more readily overlooked, as the members of the body

> held their seats during pleasure, as its acts, particularly after the failure of the Bills of Credit, depended for their efficacy on the will of the States; and as its general impotency became manifest. Examples of departure from the prescribed rule, are too well known to require proof. * * *" ["The Writings of James Madison", Hunt ed., Vol. IX, p. 419]

Nicholas, in the Virginia Convention, after referring to the source of the general welfare clause in the Articles of Confederation, said—

> "The power in the Confederation to secure and provide for those objects [common defense and general welfare] was constitutionally unlimited * * *. The same power is intended by the Constitution. The only difference between them is, that Congress is, by this plan, to impose the taxes on the people, whereas, by the Confederation, they are laid by the states. * * *" [Elliot's "Debates on the Federal Constitution", Vol. III, p. 245]

Hamilton's view is supported not only by the plain language of the Constitution but by the long-continued legislative construction placed upon the clause in Congressional practice, as illustrated by subsequent legislation with respect to the cod fisheries and a great host of other appropriation Acts of Congress. These other Acts are set forth at length in the Government's brief (pp. 154-168 and appendix pp. 61-69) and are not repeated here. The cod fishery bounties legislation is, however, set forth in some detail below in this brief. (Pages 57 to 69) Hamilton's view is also supported by the use of the taxing power to encourage domestic industry through the protective tariff taxes held valid by this Court. This matter is set forth in this brief immediately following.

(d) THE PROTECTIVE TARIFF LAWS AND THE AGRICULTURAL ADJUSTMENT ACT BOTH PROVIDE FOR THE GENERAL WELFARE, THE LATTER SUPPLEMENTING THE FORMER.

It is submitted (1) that both the protective tariff duties and the processing taxes are excises having the same objectives—the production of revenue—and, in addition, the establishment of a domestic price level higher than the world price level for commodities of domestic production; (2) that this additional objective is accomplished in the one case through the imposition or threat of imposition of the tax and in the other through expenditure of an amount measured by its proceeds; (3) that both methods produce the higher domestic price levels by creating a scarcity in the supply of the commodity available for domestic consumption; (4) that the protective tariff duties are excises that provide for the general welfare and likewise the processing taxes, in supplementing the protective tariff system and making it effective for agriculture as well as manufacture, provide for the general welfare; and (5) that this Court has held the protective tariff duties valid despite their additional objective and should make a like holding as to the processing taxes. In case of a commodity, such as short staple cotton, a minor exception to the foregoing occurs. By reason of the dominant position of short staple American cotton in the world market and the lack of a tariff duty thereon, the operations under the Act do not confine the increased price level to the domestic market but increase the world price level.

Protective tariff duties upon imports of raw materials for industrial products or upon finished industrial products are necessarily disadvantageous to agriculture. Such tariffs tax imports of foreign commodities and increase the price of domestic commodities that the farmers buy; otherwise such tariffs are ineffective. Likewise, protective tariff duties upon imports of commodities used as a basis of exchange and payment for purchases of exports of agri-

cultural surpluses also are necessarily disadvantageous to agriculture. They destroy or tend to destroy foreign markets for our agricultural exports. These propositions are well brought out by the debates on proposed duties on steel and rum in the House of Representatives in the 1st Congress during the consideration of the first protective Tariff Act of July 4, 1789.

The protective tariff system throughout our whole political history has by many been regarded as of benefit to manufacture and of injury to agriculture. This view was well expressed at a later date (February 21, 1827) by Giles when, in a speech on the floor of the Virginia House of Delegates, he denied the accuracy of Clay's comparison of the "American System", advocated by Clay, with the system of British duties then in force. Giles pointed out that in Great Britain agriculture was on an import basis and that, in consequence, the corn laws laying duties on imports offered British agriculture efficient protection and insured them "an enormous bounty". The American farmer had no equivalent protection. Continuing, Giles declared—

> "The United States are an exporting country of bread stuff of all kinds, but particularly of wheat. No foreign country, therefore, can compete with us in that article, in our own markets. Yet, as a protection to American wheat-growers, a duty of 25 cents is laid upon the importation of foreign wheat—that is the whole protection * * *. That provision is perfectly inoperative, and of course, the promised protection, nominal. No foreign wheat is ever imported into the United States, and of course, no duty is ever paid. This was precisely the case before the passage of the tariff; and it now is. In the ordinary condition of the country, therefore, the tariff protection of agriculture, is merely nominal, and inoperative. There is but one condition of the country, in which, it could be operative. That would happen, only in case of scarcity; in which case, the wheat-grower, would be more burthened with the impost upon wheat, than any other

class in society. In the event of a scarcity, the farmer would require more imported grain—relatively than any other class of the community for his seed, and for his consumption, in consequence of his greater number of hands, and beasts of labor; and the farmer of course, would have more of the 25 cents duty to pay, than persons of any other occupations.

"Of what then does the *protection of agriculture consist?* In the ordinary condition of the country, it consists of nothing. In the extraordinary case of scarcity, which in all human probability never will happen, if consists of a duty, mainly upon the agriculturist himself. Of what does *the protection of manufactories* consist under the Tariff? *What is this protection made of.* It *consists of other people's money. It is made of other people's money.* The *protection of agriculture,* then consists of *burthens upon agriculture. The protection of manufactories* consists, *mainly of burthens upon agriculture*—high intolerable burthens upon agriculture. * * * In regard to its imitative character with British policy, it would be quite laughable, were it not for its mischievous, and destructive effects upon agriculture—The best interests of the country. By the *British protection, the British agriculturists are now receiving from the other classes of society, double prices for bread-stuffs,* beyond the prices of prohibited foreign bread-stuffs; whilst the *American agriculturists* receive *nothing;* and pay double prices to the manufacture for every article of consumption—even for the implements of husbandry, which are used to raise the bread for the manufacturer. * * *" [Italicized as in original—Giles' "Political Miscellanies", (1827) pp. 92-93]

Again, it is also obvious that when more of an agricultural commodity is produced at home than is consumed there tariffs upon that commodity will not affect the domestic price since imports will be negligible under any circumstances and since competition among domestic producers, if it exists, will bring the price down to whatever quotation obtains on the world market. For the decade prior to the enactment of the Agricultural Adjustment Act, this

country had an average annual production of cotton approximating 14,000,000 bales, of which about 8,000,000 bales were exported. Domestic production frequently exceeded even the world consumption of American cotton, and the world carry-overs of American cotton increased until on August 1, 1932, they equalled 12,960,000 bales. During this period, the domestic price decreased from 31 cents to 5.4 cents per pound and the total farm values of the cotton crops from approximately $1,500,000,000 to $350,000,000.[22] Tariff protection would afford no aid to cotton under such circumstances. In recognition of the export character of the crop, there is no customs duty imposed on short staple cotton.

Even the attempted high tariffs in the Emergency Tariff Act of 1921 and the Tariff Act of 1930 on other surplus agricultural commodities such as wheat, corn, and meat have been wholly ineffective in providing higher domestic price levels. The ad valorem equivalent of duties assessed under Schedule 7 (agricultural products) of the Tariff Act of 1922 during the year 1929, the last year it was in effect, was 22.9 per cent. The ad valorem equivalent of duties assessed under that schedule in the Tariff Act of 1930 during the year 1931, the first year it was in effect, was 42.14 per cent. While the ad valorem equivalent of the tariff rates was increased by some 90 per cent, farm prices for all agricultural commodities, following the world depression, were declining on a pre-war index basis from 146 to 65 and for cotton and cottonseed from 144 to 47.[23]

With the correctness of the view that the protective tariff system is, as a matter of economics, a disadvantage to those branches of agriculture producing surpluses in excess of do-

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[22] Hearings before the Committee on Finance, U. S. Senate, 72nd Cong., 2nd Sess., entitled "Investigation of Economic Problems", Feb. 13-28, 1933, pp. 124, 138, and 139; "Agricultural Adjustment in 1934", Govt. Printing Office (1935), pp. 45-46.

[23] See publication of U. S. Department of Agriculture, Bureau of Agricultural Economics, entitled "The Agricultural Situation", Vol. 19, No. 10, p. 20, issued October 1, 1935.

mestic needs, this Court, of course, has no concern. But with the fact that the Agricultural Adjustment Act was enacted to remove the inequality between industrial and agricultural prices and that, in the judgment of Congress, this inequality is in large measure attributable to discriminations against agriculture rising from the protective tariff system, this Court is concerned. The injury to the industry of the country that would have resulted from the abandonment of a protective tariff system is obvious. Congress chose, through the Agricultural Adjustment Act, to place agricultural prices on a parity with industrial prices, rather than reduce industrial prices to the low levels of agricultural prices. That these considerations were fundamental in the mind of Congress in the enactment of the Agricultural Adjustment Act not only is brought out by numerous speeches upon the floor of the two Houses during the consideration, over a decade, of legislation for the control of surplus agricultural production but is well stated by the agricultural committees in their reports. The House Committee on Agriculture in its report on the first surplus control legislation (H. Rept. 631, 68th Cong., 1st Sess.), in discussing "suggested remedies", said—

> "Duties as provided in general tariff schedules are effective in protecting the prices of commodities of which we import a considerable part of our supply. They are also relatively effective in the case of products of which we produce only for the domestic market, barring domestic overproduction, but they do not protect adequately products of which we export a surplus. We are the greatest producers of pork and pork products in the world. In 1923 we exported approximately $266,000,000 worth of such products. The world price determines the domestic price. When world conditions are disturbed and chaotic, and when the purchasing power of Europe, our chief outlet, is low, our prices are low, and result in ruin to hundreds of thousands of American farmers. We export approximately 20 per cent of our average wheat crop, either in the form of wheat or flour. The price our

grower receives is the Liverpool price minus the cost of delivering the product in Liverpool. This price pays no attention to internal conditions in the United States. The standard of living in America may be ever so high, or cost of labor prohibitive, the cost of the supplies and equipment that the farmer needs may be beyond his power to buy, but the Liverpool price is immune to any domestic American influence.

"The tariff protects domestic products against competition with imported products within the United States. But it can not protect a domestic product when competing in world markets with other products. The protective tariff is directed toward one problem. The McNary-Haugen bill is directed toward the other. The farmers seek, and this legislation seeks to give them, an instrumentality that will effectuate tariff protection for them just as the general schedule of tariff duties protects manufactured articles, and through them, the labor used in their production." [Pp. 29-30]

Again, the declared policy of the House and Senate bills[24] reported during that session, as stated in section 1 of each bill, was—

"to make more effective the operation of the tariff upon agricultural commodities, so that such commodities will be placed upon an equality under the tariff laws with other commodities, and to eliminate as far as possible the effect of world prices upon the prices of the entire domestic production of agricultural commodities, by providing for the disposition of the domestic surplus of such commodities."

Surplus control measures reported by the subsequent Congresses also indicate that the price disparity between industrial and agricultural commodities is, in the judgment of Congress, attributable in large measure to the effect of the tariff duties and that it is the purpose of such legislation to obtain for agriculture advantages equivalent to those given industry by the tariff, remove the disadvan-

[24] H.R. 12390 and S. 4206, 68th Cong., 2nd Sess. See, also, H. Rept. 1595, 68th Cong., 2nd Sess., p. 2, and S. Rept. 1234, 68th Cong., 2nd Sess., p. 2.

tages from which agriculture suffers by reason of the tariff upon industrial commodities, and make effective the protection intended by the tariff with respect to such agricultural commodities as are subject to protective tariff duties.[25]

In the session immediately preceding that in which the Agricultural Adjustment Act became law, there was passed by the House and reported in the Senate the surplus control measure from which the present processing tax was

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[25] See declaration of policy in section 1 of H.R. 11603, 69th Cong., 1st Sess., and the House report thereon. (H. Rept. 1003, pp. 2, 4)

Also, the bill passed in the 69th Congress, 2nd Session, included in its declaration of policy the preservation of advantageous domestic markets for agricultural commodities (S. 4808, Sec. 1) and the committee reports accompanying the bill stated that there was practically unanimous agreement that one of the two important causes of the condition of agriculture was the ineffectiveness of the existing tariff laws. (S. Rept. 1304, p. 8; H. Rept. 1790, p. 10) This measure was the so-called "First McNary-Haugen Bill".

In the 70th Congress, the so-called "Second McNary-Haugen Bill" contained a similar declaration of policy to the effect that one of the purposes of the bill was to preserve advantageous domestic markets for agricultural commodities (S. 3555, Sec. 1) and the committee reports again made reference to the relationship between the tariff laws and surplus agricultural commodities as being, along with seasonal variations in yield, the important cause for the condition in which agriculture found itself. (H. Rept. 1141, p. 14; S. Rept. 500, p. 7)

The proposals for control of the surplus agricultural commodities through the so-called "debenture plan" (see appendix, p. 137) also emphasized the tariff relationship in their declaration of policy and proposed, in effect, that the tariff duties upon industrial products should be used as the appropriations to pay for diverting surpluses of agricultural commodities to foreign markets. In the report of the minority of the committee advocating that plan (H. Rept. 1141, 70th Cong., 1st Sess., Part 3, pp. 5-6) protective tariff and surplus control measures were compared at length, and it was asserted that the debenture plan was no more a subsidy in principle than is the protective tariff.

In the Farm Board Act passed by the 71st Congress and approved by President Hoover, one of the declared purposes was again the preventing and controlling of surpluses so as to maintain advantageous domestic markets (46 Stat. 11, Sec. 1), and the Senate committee in its report set forth the situation in which agriculture found itself by reason of the protection afforded by the tariff to industry in its prices for domestic commodities and the little real protection afforded to agricultural commodities which produced surpluses in excess of domestic requirements. (S. Rept. 3, 71st Cong., 1st Sess., pp. 3-4)

Through all this period, as well as during the 72nd Congress, the debates on the floors of the two Houses show how fully Congress had it in mind that the surplus control legislation was supplemental to the protective tariff.

taken. Both the House and Senate committees in their reports upon the bill made reference to the existing discriminations against agriculture, emphasizing the tariff situation. The House committee said—

> "No direct tariff can place such commodities [i. e., the major farm commodities] on a basis of equality with industrial products that for many years have had the benefit of tariff protection. Agricultural tariffs have almost without exception proved ineffective. Yet tariff rates on industrial articles which the farmer buys, and the cost of such articles to him, have greatly advanced. The result has been that the producers of agricultural commodities must bear the burden of the tariff without receiving its advantages. * * *"[26]
> [H. Rept. 1816, 72nd Cong., 2nd Sess., p. 2]

In presenting to the House the rule for the consideration of the Agricultural Adjustment Act the chairman of the Rules Committee, Mr. Bankhead, set forth the situation of the farmer under the protective tariff system as follows:

> "For a great number of years the farmers of certain sections of this country were induced to believe that their interests were properly safeguarded and protected under the protective tariff system and that all they had to do in order to continue their prosperity was to continue the high protective tariff system for agricultural products; but it seems that after many decades of trial as to the efficacy of this remedy at least a great proportion of them ultimately came to the conclusion that it was a broken staff upon which to lean. No doubt by virtue of their practical experience under the operation of this system, they came to the conclusion and ultimately learned that although rather large protective duties were laid for the protection of their products under the Fordney bill and other bills, yet in view of the fact they had to buy everything they consumed in a highly protected mar-

[26] For similar statement by the Senate Committee on Agriculture and Forestry, see S. Rept. 1251, 72nd Cong., 2nd Sess., p. 1.

ket and had to rely upon the fixing of the prices of their products in the free and open markets of the world they were not, as as matter of fact, being protected in their interests under such a system."[27] [77 Cong. Rec. 665]

The Agricultural Adjustment Act is primarily a measure to bring about such increase in agricultural prices as will compensate for the disadvantages suffered by agriculture by reason of the protective tariff upon industrial commodities that farmers buy. It makes effective the present tariff protection for producers of such agricultural commodities as are covered by tariff duties and, in the case of agricultural commodities not so covered, gives an equivalent advantage. The yardstick for measuring these aims is the equality of agricultural and industrial price levels declared as the policy of the Act. (Sec. 2)

The protective tariff case.—This Court has held the protective tariff valid as an exercise of the Federal taxing power. (*J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394) No distinction was drawn between the revenue and protection paragraphs of the Tariff Act of

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[27] Mr. Connally, during the debate in the Senate, said—

"But the Senator from Pennsylvania must admit that every piece of tariff legislation that has been enacted in the United States for the past 50 years has been based on the plea that it was in behalf of American industrial labor, the man in the shop, the man in the factory. The tariff exactions on the farmer were extorted from him on the pretext that he must let labor in the factories get a larger wage, shorter working hours, better living conditions, at the expense of the American farmer. All of us know that the tariff bears more heavily upon agriculture than upon any other industry. All of us know that the tariff benefits for agriculture are infinitesimal. We know we cannot give to agriculture generally, except in a few of its branches, any substantial benefits by tariff legislation, particularly in the case of those commodities which are exportable. No tariff will aid agricultural commodities of which we produce an exportable surplus because the surplus which is sold abroad controls the price of the domestic market here at home. If it is fair for us to enact legislation for 75 years in behalf of the industrial workers, why can we not now at least make a genuine effort, a respectable effort, toward a program in behalf of agricultural labor?" [77 Cong. Rec. 1647]

1922 under consideration in that case. The protective tariff provides a higher price level for products of our industry domestically consumed than for such products when exported from this country or for similar products when imported into this country. The domestic consumer pays this higher price. Nevertheless, the incidental motive, in many paragraphs of the Act, of protecting domestic industries from world price levels for their products when consumed on the domestic market, did not invalidate the tax.

The processing taxes provided in the Agricultural Adjustment Act have precisely the same effect as the protective tariff taxes. The sole distinction is as follows: The protective tariff taxes obtain their effect by the fact of their imposition or threat of imposition, and it is obvious that the greater the advantages afforded by them to domestic producers the less the revenue. The processing taxes obtain their effect by the expenditure of an amount measured by their proceeds, but it is also obvious that the greater the advantages afforded by such taxes to the domestic producers of agricultural commodities the greater the yield from such taxes.

In the *Hampton* case, Chief Justice Taft said—

> "It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first Revenue Act in 1789 has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the nation by protecting home production against foreign competition. It is enough to point out that the second act adopted by the Congress of the United States July 4, 1789 (chap. 2, 1 Stat. at L. 24), contained the following recital:

" 'Sec. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported:

" 'Be it enacted, etc.'

"In this first Congress sat many members of the Constitutional Convention of 1787. This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. *Myers* v. *United States*, 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection since the Revenue Law of 1789 are matters of history.

"More than a hundred years later, the titles of the Tariff Acts of 1897, and 1909 declared the purpose of those acts, among other things, to be that of encouraging the industries of the United States. The title of the Tariff Act of 1922, of which § 315 is a part, is, 'An Act to Provide Revenue, to Regulate Commerce with Foreign Countries, to Encourage the Industries of the United States and for Other Purposes.' Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional." [Pp. 411-412]

The protective tariff taxes have established a domestic price level higher than the world price level for the benefited commodities. The Agricultural Adjustment Act seeks, through expenditures made under the Act, to establish a higher domestic price level for agricultural commodities. It is submitted that if, under the *Hampton* case, customs duties levied for the admitted purpose of increasing domestic price levels for industrial products are constitutionally valid notwithstanding the limitations of the general welfare clause, then processing taxes levied to provide funds to increase domestic price levels for agricultural products are likewise valid notwithstanding the limitations of that

clause. Revenue is present in each instance, more in case of the processing tax than the protective tariff duty paragraphs. A constitutional difference should not lie merely because the advantage to domestic industry is obtained in one case through imposition, or more often threat of imposition of the tax, and in the other through expenditure of its proceeds. However, if it be said that a distinction lies in that the proceeds of the processing tax are parcelled out for the benefit of members of particular agricultural industries, so, also, it may be answered that the rates of the protective tariff taxes are parcelled out for the benefit of members of particular manufacturing industries. The only difference in substance is, as heretofore stated, that in the one case the objective is attained through the imposition or threat of imposition of the tax and in the other through the expenditure of its proceeds or of an amount equivalent thereto.

It is implicit in the decision in the *Hampton* case that the protective taxes there considered were for the general welfare, despite their advantage to industry. The processing taxes are likewise for the general welfare, despite their advantage to agriculture. In the one case, the cost to the public is composed of the taxes on importers of foreign industrial products plus increased prices for domestic industrial products; in the other, it is composed of the taxes on processors of agricultural products and on importers of competing articles plus increased prices for domestic agricultural products. In either case, the public foots the bill in the interest of the welfare of the nation as a whole. On the one hand, the *Hampton* case is authority for the use of the taxing power to accomplish objectives such as those of the Agricultural Adjustment Act; on the other, the Act is legislation "necessary and proper" to carry out fairly and reasonably, in the interest of the general welfare, the protective tariff laws.

(e) THE COD FISHERY BOUNTIES ARE A CONTROLLING LEGISLATIVE PRECEDENT.

The first protective Tariff Act of July 4, 1789 (1 Stat. 24), to which Chief Justice Taft referred in his opinion in the *Hampton* case (see p. 54, above), established a bounty as well as a protective tariff. Section 4 of that Act provided[28]—

> "Sec. 4. *And be it* [*further*] *enacted by the authority aforesaid,* That there shall be allowed and paid on every quintal of dried, and on every barrel of pickled fish, of the fisheries of the United States, and on every barrel of salted provision of the United States, exported to any country without the limits thereof, in lieu of a drawback of the duties imposed on the importation of the salt employed and expended therein, viz:
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> "On every quintal of dried fish, five cents.
> "On every barrel of pickled fish, five cents.
> "On every barrel of salted provision, five cents."

These payments to aid the Massachusetts cod fishing industry were not a drawback but "in lieu of a drawback" on any imported salt used in curing the fish or provisions exported. The bounties were required to be paid irrespective of the amount of salt used or whether, as might be in the case of dried fish, any salt was used; and also irrespective of whether the salt used was duty-paid imported salt or was salt produced in the United States. At the time, the customs duties were the only source of income adequate to pay the bounty.[29] In effect, a portion of these duties was dedicated to the payment of the bounty.

In the following year, 1791, Secretary of the Treasury Hamilton made to the 2nd Congress his Report on Manufactures, and Jefferson, Secretary of State, his Report on the Fisheries. Among the methods urged by Hamilton to

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[28] See, also, 1 Stat. 46, sec. 33. In the second session of the 1st Congress, the second Tariff Act passed by Congress provided for the continuation of the bounty with both the rate of duty on salt and the rate of the payments being doubled. (Act of August 10, 1790, 1 Stat. 180, 181-182)

[29] See Annual Report of the Secretary of the Treasury, 1932, p. 362.

encourage increased production in manufacture and agriculture were "pecuniary bounties". In his report, Hamilton recognized the prejudice against bounties, stating—

> "There is a degree of prejudice against bounties from an appearance of giving away the public money, without an immediate consideration, and from a supposition that they serve to enrich particular classes at the expense of the community. But neither of these sources of dislike will bear serious examination. * * *
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> "As to the second source of objection, it equally lies against the other modes of encouragement which are admitted to be eligible. As often as a duty upon a foreign article makes an addition to its price, it causes an extra expense to the community, for the benefit of the domestic manufacturer. A bounty does no more. But it is the interest of the society, in each case, to submit to a temporary expense, which is more than compensated by an increase of industry and wealth, by an augmentation of resources and independence, and by the circumstance of eventual cheapness, which has been noticed in another place." [3 Annals of Congress, Appendix, p. 1011]

Later in his report, Hamilton set forth his famous constitutional argument in support of bounties—

> "A question has been made concerning the constitutional right of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare,' with no other qualifications than that 'all duties, imposts, and excises, shall be uniform throughout the United States;' that no capitation or other direct tax shall be laid unless in proportion to numbers ascertained by a census or enumeration, taken on the principles prescribed in the Constitution, and that 'no tax or duty shall be laid on articles exported from any State.'
>
> "These three qualifications excepted, the power to raise money is plenary and indefinite; and the objects

to which it may be appropriated are no less comprehensive, than the payment of the public debts, and the providing for the common defence and general welfare. The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies, incident to the affairs of a nation, would have been left without a provision. The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union to appropriate its revenues, should have been restricted within narrower limits than the 'general welfare;' and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition. It is therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper; and there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the National Councils, as far as regards an application of money.

"The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made, be general, and not local; its operation extended, in fact or by possibility, throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing, not authorized in the Constitution, either expressly or by fair implication." [Pp. 1011-1012]

During the course of his report, Hamilton advocated a bounty upon the domestic manufacture of domestic cotton (pages 1027-1028) and also urged that—

"The true way to conciliate these two interests [manufacture and agriculture] is, to lay a duty on foreign manufactures of the material, the growth of which is desired to be encouraged, and to apply the produce of that duty by way of bounty, either upon the production of the material itself, or upon its manufacture at home, or upon both. * * *" [P. 1010]

Thus, Hamilton was an advocate of bounties to producers of agricultural commodities, payable out of customs duties upon competing foreign articles.

Jefferson, in his Report on the Fisheries ("American State Papers—Commerce and Navigation", Vol. 1, p. 8), among other matters, set forth the advantages which our fisheries had over those of Newfoundland sufficient to make national support unnecessary if a "vent for our fish can be procured". Then, referring to the disadvantages to our fisheries resulting from the protective tariff, he left to the wisdom of Congress the necessity for a "bounty" to the fishermen. His comment was as follows:

"Of the disadvantages opposed to us, those which depend on ourselves, are—

"Tonnage and naval duties on the vessels employed in the fishery.

"Impost duties on salt.

"On tea, rum, sugar, molasses, hooks, lines, and leads, duck, cordage, and cables, iron, hemp, and twine, used in the fishery; coarse woollens, worn by the fishermen, and the poll tax levied by the State on their persons. The statement No. 6, shows the amount of these, exclusive of the State tax and drawback on the fish exported, to be $5 25 per man, or $57 75 per vessel of sixty-five tons. When a business is so nearly in equilibrio that one can hardly discern whether the profit be sufficient to continue it or not, smaller sums than these suffice to turn the scale against it. To these disadvantages, add ineffectual duties on the importation of foreign fish. In justification of these last, it is urged that the foreign fish received, is in exchange for the produce of agriculture. To which it may be answered, that the thing given, is more merchantable

than that received in exchange, and that agriculture has too many markets to be allowed to take away those of the fisheries. It will rest, therefore, with the wisdom of the Legislature to decide, whether prohibition should not be opposed to prohibition, and high duty to high duty, on the fish of other nations; whether any, and which, of the naval and other duties may be remitted, or an equivalent given to the fisherman, in the form of a drawback, or bounty; * * *'' [P. 9]

It was with these reports and arguments before it that the 2nd Congress approached the problem of relief for the Massachusetts cod fishing industry.

Whether or not the legislation of 1789 and 1790 with respect to the cod fishing industry had been intended as a bounty or as relief from the disadvantages of the tariff is a difference without pertinent distinction. Unquestionably, the legislation provided for direct payments to the industry from the Treasury. Recognizing, however, that the relief provided was inadequate, Congress, in the Act of February 16, 1792 (1 Stat. 229), repealed the bounty on exported fish and other salted provisions and substituted for it a bounty on tonnage of the cod fishing vessels. The tonnage bounty was at the rate of $1.50 per ton for fishing vessels of 20 to 30 tons burden according to the admeasurement; $2.50 per ton if over 30 tons burden; and $1.00 per ton for vessels of more than 5 but less than 20 tons burden. The bounty was payable to the owner and crew of the vessel, provided the vessel was at sea for at least four months of the year in the bank or other cod fisheries. The bounty was also subject to a maximum of $170 per vessel. The smaller vessels from 5 to 20 tons burden were subject to a production requirement that the catch must be not less than 12 quintal of fish per ton of admeasurement to be entitled to the bounty.

Less than three months later, the same Congress, at the same session, passed the Act of May 2, 1792 (1 Stat. 259), under which the tonnage bounty payments with respect to

the cod fishing vessels were increased 20 per cent. At the same time, the bounty on exported fish in lieu of drawback under the Acts of 1789 and 1790, which had been superseded, was restored, but at somewhat lower rates, on pickled fish and other salted provision but not on dried fish. Thus, as a result of the legislation in the 2nd Congress, both the bounty on exported fish in lieu of drawback and the tonnage bounty were in effect at the same time for the benefit of the cod fishing industry.

Not only does the sequence of legislative events through 1792 indicate that the various Acts were regarded as bounty Acts but the debate on the Act of February 16, 1792, contains like indications. It was in connection with this Act of 1792 that there occurred the strenuous constitutional debate on bounties referred to by Justice Story in his "Commentaries on the Constitution", 5th ed., sec. 991.

During this debate, Madison advocated his doctrine of appropriations only to carry out the enumerated powers. It constitutes a response to Hamilton's argument in support of the constitutionality of bounties. Madison first drew a "material" distinction between "an allowance as a mere commutation and modification of a drawback, and an allowance in the nature of a real and positive bounty". He also drew a second distinction "as a subject of fair consideration at least" between "a bounty granted under the particular terms in the Constitution, 'a power to regulate trade,' and one granted under the indefinite terms". The tonnage bounty proposed he held to be a drawback, "a mere reimbursement of the sum advanced * * * only paying a debt". The assertion of power to grant bounties for anything Congress might "think conducive to the 'general welfare'" raised a fundamental and important question. That power he denied. The new Government was one of limited powers. "General welfare" was not a novel term but one repeatedly found in the old Articles of Confederation. He asked gentlemen whether it was ever supposed or suspected that Congress could give away the moneys of

the States in bounties, to encourage agriculture or for any other purpose they pleased.[30] The power claimed would permit Congress to establish courts with cognizance of suits between citizen and citizen and in all cases whatsoever. The Congress could then make expenditures for religion, education, and roads. (3 Annals of Congress 386-387[31])

Certain of the supporters of the bill, such as Goodhue and Gerry, denied that the bill provided a bounty but, within a few weeks, voted for another measure which included an increase of the tonnage bounty as well as a restoration of the bounty on exported pickled fish and other salted provisions. Madison, who voted for the tonnage bounty bill, voted against this subsequent measure. However, the large majority of those who participated in the debate regarded the measure as providing a bounty for the fisheries.[32]

The drawback analogy seems an obvious cloak to attract votes. As passed by the Senate, the bill which became the

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[30] For Madison's admission that the practice of Congress under the Articles of Confederation was contrary to his interpretation of "general welfare", see quotation, pages 43-44 of this brief.

[31] Giles earlier in the debate had said the proposed legislation might be constitutional under the doctrine of "ways and end", i. e., implied powers, but that there was a great difference between encouragement and direct bounty. Any advantage resulting to a particular organization connected with commerce "comes within that authority; but when a bounty is proposed to a particular employment or occupation, this is stepping beyond the circle of commerce; and such a measure will affect the whole manufacturing and agricultural system". (3 Annals of Congress 363) Additional arguments against the proposed legislation were those of Page, who held that Congress was not entrusted with power to regulate exports or to lay any tax which could operate unequally on the States (Id. 391), and of Williamson, who urged that a tax was not uniform unless the money was distributed uniformly. (Id. 379)

[32] All the opponents of the measure so held. (3 Annals of Congress 363, 398 (Giles); 367 (White); 374 (Murray); 378-382 (Williamson); 395 (Page)) At the same time, some of the proponents insisted that the proposed payments were only "in another mode, the usual drawback". (Id. 366 (Goodhue). See, also, Id. 376 (Gerry); 385 (Laurance); 386 (Madison)) Others of the proponents admitted or did not deny that the proposed Act was bounty legislation. (Id. 368, 370 (Ames); 375 (Barnwell); 384 (Livermore))

Act of July 4, 1789, referred to "the bounty now allowed upon the exportation of dried fish". (3 Annals of Congress 66, Sec. 1) In the House, however, the proponents agreed to and did substitute "allowance" for the term "bounty"—"by way of accommodation" according to the reporter. (Id. 374) White asked for an amendment making the drawback such "in fact, as well as in words". (Id. 367) Williamson asserted "we are perfectly agreed—that the money to be paid will be more than that received" from the duties (Id. 378) and Giles that "there can be no comparative value between the drawback and the bounty". (Id. 365)

The opponents to Madison's views urged, in accordance with the argument made by Hamilton in his Report on Manufactures, that bounties were permissible under the power to tax to provide for the general welfare. The purpose of the legislation was said to be to rehabilitate the Massachusetts cod fishing industry. Jefferson's report to Congress on the cod fisheries had been made pursuant to a memorial from the Marblehead fishermen received by Congress and referred to Jefferson. In this it was set forth, among other matters, that 33 vessels had been withdrawn from the cod fisheries because of the unprofitableness of the industry. Other purposes of the legislation were said to be to provide "a copious nursery of hardy seamen", thereby as a national defense measure supplementing the personnel of the coastwise and overseas trade; to increase the national wealth by developing fisheries; and to promote foreign trade through exchange of our fish for imports from the West Indies. To the extent that these purposes may fall within the enumerated powers of Congress, the arguments of the members of the House advocating the Hamiltonian doctrine may, in a strictly judicial sense, be dicta. They are, nevertheless, the arguments of a Congress which contained many of those who participated in the formulation or adoption of the Constitution. Furthermore, the encouragement of agriculture has as di-

rect relation to the national defense, the wealth of the nation, and our foreign trade as has the encouragement of the cod fisheries.

The argument of Barnwell is typical of those who supported bounties. He urged that people must trust the exercise of the power of granting bounties to their representatives and that—

> "whenever the two Houses of Congress and the President of the United States are of opinion that the general welfare will be promoted by raising any sum of money, they have undoubted right to raise it, provided that the taxes be uniform; * * * whatever allowance or bounty is granted upon any particular commodity, must ever be paid by the whole, for the advantage of a part, whether it be upon cotton to the Southward, upon fish to the Eastward, or upon other commodities to the middle States; * * * " [3 Annals of Congress 375]

In addition, Gerry and Laurance argued that the protective tariff constituted a legislative precedent for the pending bounty. Gerry said that the payments were "a bounty on occupation * * * an indulgence similar to what has been granted the landed and agricultural interests". He continued—

> "We have laid on hemp a duty of fifty four cents per hundred weight; and on beer, ale, and porter, five cents per gallon. Now, I ask gentlemen, whether the professed design of those duties was to raise a revenue, or to prevent the importation of those articles? they were laid for no other purpose, than to prevent foreigners from importing them, and thereby to encourage our own manufactures; and was not that encouragement a bounty to the persons concerned in producing such articles in this country? If the duties had not been laid, the importer could sell much cheaper than he now can; and the landed interest would be under a necessity of selling cheaper in proportion. If those prohibitory duties operate as a bounty in favor of raising hemp, and

of brewing beer, ale, and porter, I ask, whether, if a bounty were proposed on every quintal of fish, it might not, with the same propriety, be granted? If we have not a right to grant a bounty in the one case, we have as little right to grant it in the other.''[33] [3 Annals of Congress 376]

Following the debate, the tonnage bounty Act passed the House and became law. Except for a brief interval from 1807 to 1813, bounties for the benefit of the cod fishing industry continued in effect at increasing rates, despite reduction in salt duties, until 1866.[34]

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[33] Laurance's argument was—

''Have we not laid extra duties on various articles, expressly for the purpose of encouraging various branches of our own manufactures? These duties are *bounties* to all intents and purposes, and are founded on the idea only of their conducing to the *general interest*. Similar objections to those now advanced were not made to these duties. They were advocated, some of them, by gentlemen from the Southward. He traced the effects of these duties, and showed that they operated fully as indirect bounties.

''Mr. L. then adverted particularly to the Constitution, and observed that it contains *general* principles and powers only. These powers depend on *particular* laws for their operation; and on this idea, he contended that the powers of the Government must, in various circumstances, extend to the granting bounties. He instanced, in case of a war with a foreign Power, will any gentleman say that the General Government has not a power to grant a bounty on arms, ammunition, &c., should the general welfare require it? The general welfare is inseparably connected with any object or pursuit which in its effects adds to the riches of the country. He conceived that the argument was given up by gentlemen in opposition to the bill, when they admit of encouagement to the fishermen in any possible modification of it. * * *'' [Italicized as in original—3 Annals of Congress 385]

[34] In 1797, the duty on salt was increased to 20 cents a bushel, the bounty on exported pickled fish and other provisions to 12 cents and 10 cents per barrel, respectively, and the existing tonnage bounty on cod fishing vessels was increased by one-third. (1 Stat. 533) The Act was to remain in effect for two years but in 1800 was extended for a further period of ten years. (2 Stat. 60)

In 1807, the duty on salt was repealed and also the ''bounty'' on exported pickled fish and other salted provisions and the tariff bounty on cod fishing vessels. (2 Stat. 436) In 1813, however, the duty of 20 cents a bushel on salt was renewed, the bounty on exports of pickled fish reestablished at a higher rate of 20 cents a barrel, and the tonnage bounty reestablished at the rates under the 1797 and 1800 Acts. (3 Stat. 49) The new Act was to continue in force until the termination of the war with Great Britain, but this limitation was removed and the bounties made permanent in 1816. (3 Stat. 254)

In summary, the bounties for the cod fishing industry originated as part of the first protective tariff legislation, the second Act of the 1st Congress. Their purpose was to offset the disadvantages of the protective tariff to the Massachusetts cod fishing industry and to encourage the development of that industry. In origin they had little genuine relation to a drawback on salt, and in the 2nd Congress, and thereafter for three-quarters of a century, their "bounty" characteristics are obvious even if no more than the face of the several statutes is consulted.

Chief Justice Taft in his opinion in the *Hampton* case,[35] sustaining the protective tariff, relied primarily on the fact that such tariffs were a well-established legislative practice originating, as he pointed out, with the first Tariff Act (the same Act that provided the original cod fishery bounty). The Chief Justice further said—

> "This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively parti-

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In 1819, the tonnage bounty was increased while the duty on salt and the bounty on exported pickled fish remained unchanged. In 1824, the bounty was extended to the cod fishing vessels even though wrecked during the voyage. (4 Stat. 38)

In 1830, the duty on salt was reduced to 15 cents per bushel for the year 1831 and thereafter to 10 cents per bushel (4 Stat. 419) and was continued at the rate of 10 cents per bushel by the Tariff Act of 1832. (4 Stat. 589)

In 1842, the duty was still further reduced to 8 cents per bushel (5 Stat. 559) and in 1846 reduced to 20 per cent ad valorem. (9 Stat. 46) During all this period, however, the bounty on exported pickled fish and the tonnage bounty on cod fishing vessels suffered no corresponding reduction but remained in effect without change.

Under the 1846 Act, the "bounty heretofore authorized by law to be paid on the exportation of pickled fish" was replaced by a genuine drawback of the duty on the foreign salt used in preparing the fish for export. (9 Stat. 43) The tonnage bounty on the cod fishing vessels continued without change, however, until 1866, at which time all laws "allowing fishing bounties" were repealed. The bounty character of these payments on tonnage of the cod fishery vessels and on exported pickled fish is obvious from the course of the legislation.

[35] *J. W. Hampton, Jr. & Co.* v. *United States*, (1928) 276 U. S. 394.

> cipating in public affairs, long acquiesced in, fixes the construction to be given its provisions. * * *" [P. 412]

The bounties for the benefit of the cod fishing industry are also a legislative exposition of the Constitution at a time when the founders of our Government and the framers of our Constitution were actively participating in public affairs. The bounties were long acquiesced in, over three-quarters of a century.

Madison attempted to distinguish the tonnage bounty, in the debate in the 2nd Congress, as being a bounty to carry out the enumerated powers and voted for it as being a mere commutation of drawback. Any reasonable interpretation of the debate during the 2nd Congress shows that this was not the fact, and the same Congress increased the bounty within three months to such an extent that Madison voted against it. A bounty for the benefit of the cod fishing industry is no more an appropriation to carry out enumerated powers than are the payments made to agriculture under the Agricultural Adjustment Act. It is submitted that encouragement of cod fishing is no more a matter of commerce or of national defense than is encouragement of agriculture. Each has a relation to trade and each is necessary to the national defense. Quantitatively speaking, agriculture's value and relationship to trade and national defense, then as now, greatly exceeds that of the cod fisheries.

The decision in the *Hampton* case is a direct precedent for the constitutional validity of the expenditures under the Agricultural Adjustment Act. The doctrine of contemporaneous legislative exposition is as applicable to bounty as to protective tariff legislation. In addition, the type of expenditures made to date under the Agricultural Adjustment Act for the cotton program have a feature not present in the bounties for the benefit of the cod fishing industry, namely, the expenditures are pursuant to contrac-

tual arrangements between the Government and the farmer, under which the farmer has a definite commitment to reduce acreage or production. The payments are not mere gratuities but involve a *quid pro quo*.

(f) THE APPROPRIATIONS UNDER THE ACT ARE FOR THE GENERAL WELFARE.

(*1*) *The objects of the appropriations.*—Section 12(b) of the original Act provides, in addition to the expenditures for administrative expenses and refunds on taxes, four objects of expenditure of processing tax receipts for carrying out surplus control programs. These objects of expenditure are (section 8(1) and section 12(b))—

1. Expenditures for expansion of markets and removal of surplus agricultural products.
2. Bounty payments upon that part of the production of any basic agricultural commodity required for domestic consumption.
3. Contractual rental and benefit payments for reduction in acreage or reduction in production for market, or both, of any basic agricultural commodities, through agreements with producers or by other voluntary methods.
4. Reimbursement of Treasury for advances for items 2 and 3 and for administrative expenses and tax refunds under the Act.

These objects of expenditure are to be sharply differentiated. The cotton processing tax is available for any or all of these objects of expenditure but each of the objects of expenditure involves in some respects different constitutional considerations. Actually (see p. 34 above), the proceeds from the cotton processing taxes have all been expended for reimbursement of advances from the general funds of the Treasury (i. e., item 4 above) made for admin-

istrative expenses and tax refunds and for contractual rental and benefit payments. These contractual payments are of two kinds: First, rental payments for reduction of acreage based on average yield of the land during a base period; and, second, benefit or "parity" payments for reduction of acreage based on the portion of the farmer's production considered as moving into domestic consumption.[36] No expenditures of cotton processing taxes have been made for items 1 and 2, or directly for item 3.

Moreover, under section 12(b), as amended August 24, 1935, expenditures for administrative expenses, tax refunds, bounty payments, and contractual rental and benefit payments are to be made from an appropriation from the general funds of the Treasury of an amount equal to the proceeds of the processing taxes. The processing taxes are no longer directly appropriated for these purposes. Further, the provisions making the processing taxes available for expenditures for expansion of markets and removal of surpluses is superseded by section 32 of the amendatory Act of August 24, 1935. That section appropriates 30 per cent of the gross receipts from customs duties to—

> "(1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce; and (3) finance adjustments in the quantity planted or produced for market of agricultural commodities. * * *"

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[36] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), pp. 46-49.

(2) *General welfare does not depend on whether the tax proceeds become general funds of the Treasury.*—A tax is one to provide for the general welfare of the United States if its proceeds are to be used for the general welfare. (Cf. p. 25, above) The proceeds of a tax levied by the Federal Government are almost without exception covered into the Treasury of the United States. Customarily, and in the absence of any restriction imposed by Congress, the proceeds of the tax, as a matter of bookkeeping, are credited to the general funds of the Treasury. The dollars received from a particular tax are not customarily earmarked for a particular expenditure and segregated. It is therefore ordinarily impossible to test the question as to whether a tax is one to provide for the general welfare, by discovering the particular expenditure met by the use of the proceeds of the particular tax. All that can be said is that the expenditure is made from the general funds in the Treasury and that those general funds are composed of receipts from the particular tax and all other taxes, receipts from bond issues and other Treasury obligations, and receipts from other sources not involving taxation. In consequence, if the proceeds from a tax are credited to the general funds of the Treasury, such a tax provides for the general welfare for, obviously, the purpose to which its proceeds went is not discoverable and the presumption is that they were among those appropriated and expended for an object within the general welfare. This must be true even though among the numerous appropriations made by Congress there may be some which are not, strictly speaking, for the general welfare.

In the case of the processing taxes their proceeds are likewise covered into the Treasury. But under the original Act the proceeds were segregated. They were appropriated for administrative expenses, tax refunds, and bounty and contractual payments under the Act. They were also appropriated to reimburse the Treasury for ad-

vances for such purposes and, in actuality, they have been expended only for reimbursement of such advances. (See page 34, above)

In order for a tax to be one to provide for the general welfare it is not necessary that its proceeds be credited to the general funds of the Treasury. Congress has frequently earmarked particular tax proceeds for particular objects of expenditure. Thus, in the 1st Congress, section 60 of the Act of March 3, 1791, 1 Stat. 199, 213, laying import duties and internal revenue taxes upon distilled spirits, provided—

> "That the nett product of the duties hereinbefore specified, * * * is hereby pledged and appropriated for the payment of the interest of the several and respective loans which had been made in foreign countries, prior to the fourth day of August last; and also upon all and every the loan and loans which have been and shall be made, and obtained pursuant to the act, intituled 'An act making provision for the debt of the United States;' * * * and subject to this farther reservation, that is to say—Of the nett amount or product during the present year, of the duties laid by this act, * * * to be disposed of towards such purposes for which appropriations shall be made during the present session."

The Act then continued—

> "And to that end that said monies may be inviolably applied in conformity to the appropriation hereby made, and may never be diverted to any other purpose until the final redemption, or reimbursement of the loans or sums for the payment of the interest whereof they are appropriated, an account shall be kept of the receipts and disposition thereof, separate and distinct from the product of any other duties, impost, excise, and taxes whatsoever, except those heretofore laid and appropriated to the same purposes."

There were similar Acts in the early Congresses, dedicating the proceeds of a particular tax to a particular object of expenditure.[87]

As heretofore set forth (page 35), it should make no constitutional difference if Congress levied the processing tax in a separate Act and provided that its proceeds should be credited to the general funds of the Treasury and then in the Agricultural Adjustment Act appropriated from general funds of the Treasury amounts sufficient for the expenditures under that Act. In other words, a tax, even though the proceeds are earmarked as to their use, is as much for the general welfare as one not so earmarked. The total Government expense must be met from the total Government receipts, and earmarking of particular tax proceeds for one purpose merely frees other tax proceeds for other purposes.

However, even if earmarking of the proceeds of the processing taxes were a constitutional objection to the validity of the taxes, the objection no longer exists. As heretofore pointed out (page 29), the processing taxes are no longer appropriated for the purposes of the Act. Their proceeds are merely a part of the general funds of the Treasury and serve as a measure for the amount of appropriations made from the general funds in the Treasury for the purposes of the Act.

(*3*) *The decisions of this Court.*—If, however, by reason of the fact that the proceeds of the processing taxes were

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[87] The Act of May 8, 1792, 1 Stat. 267, pledging and appropriating the proceeds of internal revenue taxes on distilled spirits levied by the Act to the same purposes as those set forth in the Act of March 3, 1791; the Act of March 3, 1797, 1 Stat. 503, appropriating the tariff duties levied by the Act "First, for the payment of the principal of the present foreign debt of the United States: Secondly, for the payment of the principal of the debt now due by the United States to the Bank of the United States"; the Act of May 13, 1800, 2 Stat. 84, appropriating the proceeds of the duties levied to the payment of interest and principal of the debts of the United States; and the Act of March 26, 1804, 2 Stat. 291, providing that the proceeds from the increased tariffs levied by the Act should be covered into a separte fund to be used for the sole purpose of carrying on a war against the Barbary powers.

originally earmarked for particular objects of expenditure and still serve as the measure for the amount of an appropriation for such objects, that tax is to be subject to more rigid constitutional requirements than taxes the proceeds of which are credited to the general funds of the Treasury and used for appropriations made by Congress without reference to source or amount of receipts; and if, despite the holding of this Court in the case of *Frothingham* v. *Mellon,* (1923) 262 U. S. 447, respondents may litigate the question as to whether the tax is valid in view of the fact that its proceeds serve as a yardstick to measure appropriations—then it is submitted that the appropriations under the Agricultural Adjustment Act are for the general welfare and the processing tax is one to provide for the general welfare of the United States. This conclusion should readily follow from the decisions of this Court in the Sugar Bounty Case (pp. 37-40, above) and the Protective Tariff Case (pp. 53-56, above) and from the legislative precedent in the matter of the bounties for the cod fisheries (pp. 57-69, above).

The Sugar Bounty Case, *United States* v. *Realty Company,* (1896) 163 U. S. 427, demonstrates that Congress may impose taxes whose proceeds are to be expended for carrying out an objective other than one falling within the enumerated administrative and regulatory powers of Congress. Payment of moral debts arising from sugar bounty legislation is clearly not one of the enumerated administrative or regulatory powers of Congress. If the clause "to pay the Debts" is not limited to debts incurred in carrying out the enumerated powers, then the clause found immediately thereafter in the same paragraph of the Constitution, to "provide for the common Defence and general Welfare" should be similarly construed.

Protective tariff legislation was sustained in the *Hampton* case as an exercise of the taxing power of Congress despite the additional non-revenue purpose of the taxes levied by the protective paragraphs of the Tariff Acts.

It should follow that the appropriation of proceeds of the processing taxes for the similar purpose of protecting the domestic price level of the agricultural industry would be for an equally valid purpose. In each case, the tax has the primary purpose of producing funds which are covered into the Treasury, and in each case there is the additional purpose (in the one instance through imposition or threat of imposition of the tax, in the other through expenditure of its proceeds) to encourage domestic producers and provide a higher price level for their products domestically consumed. That additional purpose should not prevent a tax which produces substantial revenue that is covered into the Treasury from being a tax to provide for the general welfare when the two purposes are so nearly identical and vary only through the means by which they are accomplished.

Finally, the legislative precedent of the bounty for the Massachusetts cod fisheries (originating with the 1st Congress, debated at length in the 2nd Congress and again enacted by that Congress, and thereafter continued in effect, with but a brief interval, for three-quarters of a century) seems clearly to indicate that an outright bounty, and *a fortiori* contractual payments, for encouragement of an industry such as agriculture, constitutes an appropriation for the general welfare and, therefore, taxes to provide for such payments are taxes to provide for the general welfare.

Thus, in the foregoing precedents there are found three basic principles, namely, that Congress may tax to provide for the general welfare, that the general welfare is not limited to the subject matters of the enumerated administrative and regulatory powers of Congress, and that appropriations to aid domestic industry are appropriations to provide for the general welfare.

Obviously, other decisions of this Court upon the validity of taxes, having regard to their objects of expenditure, involve no holding contrary to the position taken by amicus curiae. There was involved in *Citizens' Savings*

& Loan Association, etc. v. *Topeka,* (1875) 20 Wall. 655, a donation of bonds to a manufacturing company as an inducement to the company to establish its iron works in the city issuing the bonds; in *City of Parkersburg* v. *Brown,* (1883) 106 U. S. 487, the lending of bonds to a manufacturing concern for the purpose of aiding in the erection of a foundry and machine works in the city issuing the bonds; and in *Cole* v. *City of La Grange,* (1885) 113 U. S. 1, the donation of bonds to a manufacturing company to aid it in the establishment of a rolling mill in the city issuing the bonds. These cases, while holding that the particular State legislative Acts involved taxation for a private and not a public purpose, are clearly, by reason of the fact that only a particular concern was directly benefited, not precedents with respect to the question as to whether Federal appropriations expended to benefit the agriculture of the country and, by so doing, all industry and labor, are for the general welfare. In such cases as *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649; *United States* v. *Realty Co.,* (1896) 163 U. S. 427; *Smith* v. *Kansas City Title & Trust Co.,* (1921) 255 U. S. 180; and *Massachusetts* v. *Mellon,* (1923) 262 U. S. 447, this Court did not find it necessary to determine whether the particular Federal statutes there considered involved the use of the Federal power of taxation to provide for the general welfare.

Finally, there are a number of decisions of this Court involving Federal and State pecuniary exactions not strictly taxes but in the nature of taxes in that payment was compulsory and the proceeds were administered and expended by public authorities. In each instance, the proceeds were dedicated to a particular object of expenditure and the impositions and expenditures authorized by the legislation presented in part questions analogous to the question as to what constitutes general welfare.

In the Head Money Case (*Edye* v. *Robertson,* (1884) 112 U. S. 580) the Federal statute imposed a duty upon every foreign passenger coming into a port within the United States, the moneys collected constituting a fund to be ex-

pended under the direction of the Secretary of the Treasury, among other purposes, for the care of immigrants and the relief of such as were in distress. *Dayton-Goose Creek Rwy. Co.* v. *United States,* (1924) 263 U. S. 456, concerned the validity of the "recapture clause" of the Interstate Commerce Act, as amended. Under that Act, carriers were required to pay over their net income in excess of a fair return, as fixed by the Interstate Commerce Commission, one-half to a reserve fund to be maintained by the carrier as trustee and expended only for specified purposes and the other half to a revolving fund to be administered by the Commission in making loans to weaker carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account, and for buying equipment or facilities and leasing or selling them to carriers. The exactions in both these cases were held valid, not as taxes but as Congressional regulations of interstate and foreign commerce.[38]

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[38] There are also a number of State statutes held valid by this Court and presenting somewhat analogous situations. It was held in *Jones* v. *City of Portland,* (1917) 245 U. S. 217, that the establishment and maintenance by a municipality of a public yard for the sale of wood, coal, and fuel, without financial profit, to the inhabitants of the municipality was a proper exercise of the power of taxation; and in *Green* v. *Frazier,* (1920) 253 U. S. 233, that a State could exercise its power of taxation for the creation of, and furnishing capital for, a State bank in order to loan the funds of the bank, including public funds on deposit, to individuals and organizations; for the creation of, and furnishing capital for, a State agency to engage in the manufacture and marketing of farm products and to establish and maintain a warehouse, elevator, and flour mill system; and for the creation of, and furnishing capital for, a State agency to engage in the business of providing homes for residents of the State.

As to State compulsory pecuniary exactions for bank depositors' guarantee funds (*Noble State Bank* v. *Haskell,* (1911) 219 U. S. 104 and 575; *Shallenberger* v. *First State Bank of Holstein,* (1911) 219 U. S. 114; and *Abie State Bank* v. *Bryan,* (1931) 282 U. S. 765) and for a State workmen's compensation fund (*Mountain Timber Co.* v. *Washington,* (1917) 243 U. S. 219), this Court found such exactions valid despite the limitations of the due process clause of the Fourteenth Amendment. In the latter case, Mr. Justice Pitney stated that, whether the compulsory contribution by employers to the State fund was regarded as a tax or as an imposition, the Court was clearly of the opinion that the State might enact the legislation in the exercise of its power to pass such legislation as reasonably deemed necessary to promote the health, safety, and general welfare of its people.

All the foregoing cases concerning compulsory pecuniary exactions not strictly taxes involved, either admittedly or by implication, in consequence of the limitations of the due process clause, the question whether the purpose to which the proceeds of the compulsory pecuniary exaction were dedicated was sufficiently public in character to constitute a valid exercise of Federal power.

(4) *The question of whether surplus control of agricultural commodities is for the general welfare is not one for which the courts will substitute their judgment for that of Congress.*—It is the position of amicus curiae that whether an appropriation (or a tax to raise the moneys for the expenditures authorized by the appropriation) is for the general welfare is primarily a question for Congress alone to decide and one as to which the courts will not substitute their judgment for the judgment of Congress. Hamilton, in his Report on Manufactures (3 Annals of Congress 1012), had previously said that it was "left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper". Madison himself, when President, in his veto message of March 3, 1817, on the National Bank "Bonus Bill" took a like view ("Veto Messages of the

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In the *Noble State Bank* case, Mr. Justice Holmes drew the distinction between legislation providing public expenditures pursuant to guarantees of bank deposits and legislation such as that involved in *Citizens' Savings & Loan Association, etc.* v. *Topeka,* (1875) 20 Wall. 655, discussed above (page 37). He said—

> "It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso.* v. *Topeka,* 20 Wall. 655; *Lowell* v. *Boston,* 111 Mass. 454." [P. 112—Italicized as in original]

It will be recalled that in the *Loan Association* case the public credit of the whole community was extended for the benefit of a single manufacturing concern to induce it to establish its plant in the community.

Presidents of the United States", (1886) S. Mis. Doc. 53, 49th Cong., 2nd Sess., p. 17), saying—

> "questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision."

Likewise, President Monroe in a message accompanying his veto message of May 4, 1822, on the Cumberland Road Bill (Richardson's "Messages and Papers of the Presidents", p. 166) stated that—

> "Had the Supreme Court been authorized, or should any other tribunal distinct from the Government be authorized, to impose its veto, and to say * * * that the appropriation to this or that purpose was unconstitutional, the movement might have been suspended and the whole system disorganized. It was impossible to have created a power within the Government or any other power distinct from Congress and the Executive which should control the movement of the Government in this respect and not destroy it. * * * "

Certainly, the foregoing should be the rule if Congress has any facts before it that justify the conclusion that a particular tax or appropriation is for the general welfare. The courts should not substitute their judgment for that of Congress on such a question. As said by this Court in *United States* v. *Realty Co.*, (1896) 163 U. S. 427—

> "In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government. * * *" [P. 444]

If the Congressional determination of whether or not a tax is one to provide for the debts of the United States can rarely, if ever, be a subject of review by the judicial branch of the Government, it is submitted that the Congressional determination of whether or not a tax is one to provide for the general welfare of the United States can rarely, if ever, be a subject of review by the judicial branch of the Government.

If this Court is to review to any extent the question of whether the taxes and appropriations under the Agricultural Adjustment Act provide for the general welfare, its review should be limited to the question as to whether there is any reasonable basis for the Congressional conclusion that the taxes and appropriations do so provide. Congress by its enactment of the legislation has said that in its judgment they do. Moreover, during their consideration of surplus control legislation, the agricultural committees of the two Houses gave attention to the question in their reports upon such legislation. In the report of the House Committee on Agriculture on the earliest of the surplus control measures (H. R. 9033, 68th Cong., 1st Sess.), the committee discussed the question as to whether the appropriations involved were for the general welfare. It outlined in detail in the earlier portion of its report (H. Rept. 631, 68th Cong., 1st Sess., pp. 9-10) the importance of agriculture to the general welfare. Later, it discussed in the report the validity of the legislation under Article I, Section 8, Clause 1, of the Constitution. The committee said—

> "It will probably be generally admitted that an appropriation to aid agriculture is 'for the general welfare,' even without regard to the present emergency. In his final message to Congress President Washington, in recommending the establishment of a national university, stated:
>
> " 'It will not be doubted that with reference either to individual or national welfare agriculture is of primary importance. In proportion as nations advance in population and other circumstances of ma-

turity this truth becomes more apparent and renders the cultivation of the soil more and more an object of public patronage. Institutions for promoting it grow up, supported by the public press; and to what object can it be dedicated with greater propriety? (I Richardson, Messages and Papers of the Presidents, 201.)'

"President Coolidge, in his address before the National Republican Club in New York City, February 12, 1924, stated that agriculture—

" 'is an interest on which it is estimated that more than 40,000,000 of our people are directly or indirectly dependent. It represents an investment several times as large as that of all the railroads of the country. It has an aggregate production of over $8,000,000,000 each year. * * *

" 'You can not long prosper with that great population and great area in distress. * * * This problem is not merely the problem of the agricultural sections of our country. It is the problem likewise of industry, of transportation, of commerce, and of banking.'

"The facts set forth in the earlier part of the report upon the bill establish beyond question the existence and the seriousness of the present emergency. The facts for the most part are beyond dispute. In view of this emergency, it would seem that there can be no doubt that the appropriation authorized is one 'to provide for the general welfare'." [P. 58]

The committee was of the view that if Congress determined that an appropriation is for the general welfare its decision would be entitled to, and would be accorded, great weight by the courts. After referring to the *Realty Company* case and quoting the extract from that case set forth above (page 79), the committee said—

"In Smith *v.* Kansas City Title Co. (1921, 255 U. S. 180, 210), the Federal Farm Loan Act was held constitutional, notwithstanding the contention that the appropriation of money for the capital stock of the Federal land banks and for the use of the Federal Farm Loan Board was beyond the power of Congress. (See

the brief of Hon. Charles Evans Hughes in support of the validity of the appropriation, quoted in part by Corwin, The Spending Power of Congress, 36 Harvard Law Review, 548, 578, 581—notes 83, 84.)

"Although it would not seem necessary in order to support the appropriation in question, there is good authority for the position that the question is a political one and will not be reviewed by the courts. (See Burdick, Federal Aid Legislation, 8 Cornell Law Quarterly 324; Corwin, The Spending Power of Congress, 36 Harvard Law Review 548; Note, 9 Cornell Law Quarterly 50)." [P. 59]

The committee concluded its discussion of general welfare by referring to the principle set forth in the case of *Frothingham* v. *Mellon* and also referring to a number of legislative precedents in which Congress had made appropriations for the purchase of stock in governmental corporations to engage in business, appropriations for agriculture, appropriations to stimulate commerce, and appropriations "for other than Federal governmental purposes, in the strict sense". (Pp. 59-60)

In subsequent reports upon surplus control legislation, committees of Congress again pointed out the national character of the agricultural problem. Thus, the Senate Committee on Agriculture and Forestry said—

"These are cold statistical measurements of the agricultural situation. A far more impressive picture has been placed before your committee repeatedly by men familiar with agriculture in every section of the United States. The facts they have presented leave no doubt of the existence of a grave agricultural problem that concerns not farmers alone, but all who are interested in the preservation of a sound national life in this country.

"Agricultural production is so closely interwoven with the general business structure of the Nation, and plays so large a part in our national economic life, that there is no individual, no matter what his occupation or place, who would not ultimately be affected by continued agricultural depression.

"As the chief source of our food supply, agriculture is a principal factor in maintaining our national security, as well as a major economic necessity. But the farm also looms large as a primary source of supply for industrial raw material, as a purchaser of goods and services furnished by the rest of the population, as a reservoir of future citizenship, and as bearing a large portion of the cost of Government activities.

"The National Industrial Conference Board of New York, an authoritative research organization, recently completed an exhaustive study of the agricultural situation. The following facts, as presented by Virgil Jordan, chief economist of the board, strikingly sum up some measurements of the important place of agriculture in the national economy:

"It normally exerts a purchasing power for nearly $10,000,000,000 worth of goods and services of other groups annually.

"It purchases annually about a tenth of the value of the products of our manufacturing industries.

"It supplies materials upon which depend industries giving employment to nearly half of our industrial workers.

"It pays indirectly about two and half billions in wages of urban workers.

"Its products constitute nearly half of the value of our exports.

"It pays in taxes one-fifth of the total cost of government.

"It is a billion-dollar real-estate business, as measured by the rent paid by the farm tenants.

"The capital invested in it in 1919 more than equalled that invested in our manufacturing industries, mines, and railroads combined.

"It represents about a fifth of our national wealth, and normally contributes about a sixth of the national income.

"Since it supplies not only the food for our industrial workers but about a third of the materials of our industries and a market for a large part of their products, it forms the basis of our industrial prosperity, and changes in the volume of trade tend to follow

changes in the purchasing power of farmers.'"[39] [S. Rept. 1304, 69th Cong., 2nd Sess., pp. 13-14]

The legislative history of the Agricultural Adjustment Act during the 73rd Congress, 1st Session, must be read in close connection with that of the so-called "National Emergency Bill" passed by the House and reported in the Senate but a few weeks before during the 72nd Congress, 2nd Session. That bill provided for a processing tax and obviously served, even in details of language, as a model for the processing tax provisions of the Agricultural Adjustment Act. The National Emergency Bill embodied the fundamental principles of the Agricultural Adjustment Act. Its only pertinent major difference in substance was that its appropriations were available only for bounties upon that portion of the production of agricultural commodities needed for domestic consumption, i. e., the domestic allotment, while the present Act authorizes appropriations not only for that purpose but also for removal of surpluses to foreign or other markets and for rental or benefit payments, through contracts or other voluntary means, for reduction of acreage or of production.

Considering the committee reports upon both the Agricultural Adjustment Act and the National Emergency Bill during the preceding session, there is no difficulty in ascertaining in which respects the agricultural committees of Congress regarded the proposed legislation as legislation providing taxes and as appropriations for the general

[39] For similar statement by the House Committee on Agriculture, see H. Rept. 1790, 69th Cong., 2nd Sess., pp. 15-16. Also; in the first session of the 69th Congress the House committee in discussing the Government's relation to the agricultural problem urged at length the necessity for governmental assistance, referred to such legislative precedents as the numerous appropriations for agricultural colleges, the "billions" spent for the development of arid lands and the building of transcontinental railroads, the "pioneering for general welfare" involved in the merchant marine subsidies, Muscle Shoals legislation, the capital provided for the Federal land bank system, and the expenditures growing out of Federal control of railroads. (H. Rept. 1003, 69th Cong., 1st Sess., pp. 12-15)

welfare. Thus, the House committees found that, by reason of the discriminations against agriculture, with particular reference to those flowing from the tariff situation, the farmer's purchasing power for clothing, lumber, hardware, machinery, and the like was less than half normal; that lack of agricultural purchasing power was responsible directly and indirectly for more than six million of the unemployed; and that the elimination of the price disparity between agriculture and industry would bring about a better balance of national purchasing power, reduce the number of unemployed, aid in reestablishing the purchasing power of labor and other consumers as well as agriculture, and be an effective measure toward meeting the present national emergency. (H. Rept. 1816, 72nd Cong., 2nd Sess.) The committee, on page 1 of its report, stated that the hearings held by it in the 72nd Congress, 2nd Session[40]—

> "emphasize the relation of the present situation of agriculture to the general economic depression and develop, in much fuller detail than can be set forth in this report, the fact that this legislation is not a measure solely for the relief of agriculture but is a bill intended to assist in meeting the present national economic emergency in industry, employment, transportation, and finance as well."

The House committee also reached the conclusion that the charges upon processing would undoubtedly cost the consumer money—

> "but this money will promptly be spent by the farmer in ways which will decrease unemployment and add to the profits of business. * * * The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between our productive forces." [P. 7]

The Senate committee, in its report during the 72nd Congress, 2nd Session, found that the loss of purchasing power

[40] Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932.

on the part of the farmers had had a most serious effect upon industry in general through the inability of farmers to buy industrial products and, moreover, had deprived the farmer of his ability to meet his indebtedness. (S. Rept. 1251, 72nd Cong., 2nd Sess., p. 2) The committee also referred to the ultmate benefits to the consumer and the business man that would follow from the enactment of the proposed legislation. (P. 4)

In the 73rd Congress, 1st Session, the House Committee again referred to the fact that the additional return to be received by farmers by reason of the operation of the bill would be money promptly spent by the farmer in ways that would decrease unemployment and add to the profits of business and that the increased return would also increase the assets behind our rural banking structure and do more to relieve the banking situation in rural communities than any other type of legislation. The committee also referred to the gains that the consumer and the business man might expect to obtain from a well-balanced relationship between production and consumption that would restore to agricultural commodities their pre-war purchasing power and, in conclusion, stated that the measure was "essential to the relief of the national emergency". (H. Rept. 6, 73rd Cong., 1st Sess.)

It is submitted that the only conclusion to be reached is that Congress was of the view that the legislation was not only in the interests of agriculture but of business and of the consumer—that is, the legislation would provide for the general welfare. The committees referred to the various hearings held within the few months immediately preceding the reporting of the proposed measures, which served as the basis for the committee conclusions. It is impracticable to set forth in this brief any adequate summary of the testimony at these hearings, but an examination of the transcripts thereof—all upon specific legislative proposals of a character substantially the same as the measure finally enacted into law—will show that the conclusions reached

by the committees of Congress were not only reasonable but were supported by the testimony at the hearings.[41] It is to be presumed that the Congress acted upon the basis of those hearings and committee conclusions.

Whatever may be the views of this Court as to the policy or wisdom of the legislation and as to whether legislation of the character enacted was the best means of providing for the general welfare in the emergency that faced the nation, it is submitted that, on the basis of the legislative record before Congress, the conclusions of the committees and of Congress that the legislation would provide for the general welfare were not arbitrary and are not therefore subject to redetermination by this Court.

Furthermore, this Court may take judicial notice of the fact that, whether or not attributable in part to the Agricultural Adjustment Act, the light of events shows that parity prices have been obtained for most agricultural commodities, that prices for most of these commodities are now on an equality with industrial prices, and that there has been a distinct economic improvement not only in agriculture but in business generally.

Amicus curiae rests upon the foregoing arguments its conclusion that, as a matter of law, the taxes and appropriations under the Agricultural Adjustment Act provide for the general welfare. The Government in its brief, however, (pages 179 to 227) has set forth at length the detailed objectives of the Act and economic data for the conclusion that the achievement of these objectives will promote the general welfare. With the position taken in the Government's brief, the accuracy of the facts set forth, and the conclusions drawn therefrom amicus curiae is wholly in accord.

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[41] The hearings in question, all held in the 72nd Cong., 2nd Sess., are: Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932; Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Adjustment Relief Plan", January 25-February 6, 1933; Hearings before the Committee on Finance, U. S. Senate, entitled "Investigation of Economic Problems", February 13-28, 1933, pp. 108 to 162.

(5) *The appropriation and expenditure provisions are not in violation of the Tenth Amendment.*—The power of Congress in question in this litigation is the power of taxation as affected by the appropriations under the Act and the expenditures pursuant thereto by the executive. When the power exerted is solely this power to tax for the general welfare, there can be no validity to the claim by the respondents that the taxing, appropriation, and expenditure provisions constitute a violation of the powers reserved to the States by the Tenth Amendment to the Constitution. These powers are delegated to the Federal Government by the Constitution. The Tenth Amendment reserves to the States, or to the people, only those powers not delegated to the Federal Government by the Constitution. The Federal powers of taxation, appropriation, and expenditure are not so reserved.

However, the contention of respondents seems to be that the exertion of the Federal power in this instance amounts to something more than the levying of taxes and the appropriation and expenditure of moneys of the United States. They urge that, in effect, the exertion of these powers constitutes a regulation of the production of agricultural commodities and, therefore, regulation of a matter reserved to the States by the Tenth Amendment. It is submitted by amicus curiae that no such regulatory power is attempted to be exerted by Congress. The Act establishes no regulatory requirements with respect to production. The Act does not require that acreage or production be reduced or that farmers enter into an agreement with the Secretary of Agriculture to do so. The sole authority of the Secretary of Agriculture in this connection is—

> "To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, *through agreements with producers or by other voluntary methods,* and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, * * *" [Sec. 8(1)—Italics supplied]

The House Committee on Agriculture in its report on the Act (H. Rept. 6, 73rd Cong., 1st Sess., p. 3) emphasized that such reductions in acreage or production are to be arranged for through agreements or other voluntary methods. There is no attempt at compulsion. No producer has to enter into an agreement with the Secretary. No producer has to accept any rental or benefit payment. No producer has to reduce his acreage or production for market unless he desires to do so. He may refrain from accepting any payments offered him by the Federal Government and continue to produce without regard to any Federal crop program under the Act. He may, but only if he chooses, and then only through his own voluntary act, adapt his production and marketing to such a Federal program.

The statement of Mr. Justice Sutherland with reference to the Maternity Act considered in *Massachusetts* v. *Mellon*, (1923) 262 U. S. 447, is wholly pertinent:

> "First. The state of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the state, and is a usurpation of power; viz., the power of local self-government reserved to the states.
>
> "Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation, *but simply extends an option which the state is free to accept or reject.* * * *
>
> * * * * * * * * * *
>
> "* * * Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." [Pp. 480-482—Italics supplied]

So here the individual producer is simply extended an option which he is free to accept or reject.

Not only is this voluntary character present in theory, but also it is true in practice. The original crop adjustment programs were entered into after meetings held by

farmers throughout the crop areas concerned. The programs were entered into only if such meetings indicated to the Secretary of Agriculture that a sufficient number of farmers would enter into voluntary contracts with him to assure such cooperation that the crop adjustment program might reasonably be expected to be effective in carrying out the declared policy of the Act. Referenda open to all producers of a particular commodity were held before a crop adjustment program for that commodity was continued for a second year. The results of these referenda are set forth in the following table:

Commodity program	Date of referenda	Contract-signers		Noncontract signers		Total farmers	
		Voting	Favoring continuance	Voting	Favoring continuance	Voting	Favoring continuance
Corn-hogs [a]	Oct. 15, '34	535,690	69.9%	44,026	33.1%	579,716	67.2%
Wheat [b]	May 25, '35	398,277	89.0%	68,443	72.8%	466,720	86.7%
Tobacco [c]	Je., Jy., '35	(*)	(*)	(*)	(*)	377,271	95.6%
Corn-hogs [d]	Oct. 26, '35	745,415	91.3%	195,988	67.6%	941,403	86.4%

* Separate figures not available.

[a] See U. S. Dept. Agr., "Agricultural Adjustment in 1934", (1935) pp. 108-109.

[b] See U. S. Dept. Agr., Agri. Adj. Adm., "Wheat Production Adjustment", No. 20, June 25, 1935. Revised by addition of figures for Indiana.

[c] See U. S. Dept. of Agr., Agri. Adj. Adm. Press Releases 32-36 and 268-36, July 6 and August 16, 1935.

[d] Preliminary tabulation. See U. S. Dept. Agr., Agri. Adj. Adm. Press Release 749-36, Oct. 30, 1935.

The results of the referenda clearly indicate that a substantial number of farmers did not enter into voluntary agreements under the original programs and also that a substantial, although smaller, number are unlikely to enter into voluntary agreements under the continued program. Obviously, such a situation involves no coercion and no regulation. The option "to accept or reject" referred to by Mr. Justice Sutherland exists in actuality.

Further, an agreement or contract is the usual method by which the Federal Government carries out its powers

of expenditure. Most moneys appropriated are expended in fulfillment of contractual obligations entered into on the one hand by the Federal Government and on the other by individual citizens. The enforcement of the contracts under the Agricultural Adjustment Act is by ordinary judicial process. No sovereign right of the States is interfered with and the contracts are subject to the usual contract law of the State. The contracts are merely a necessary and proper method of carrying out the expenditure powers of the Federal Government.

The coercion and the mandatory rules of conduct which were present in *Hammer* v. *Dagenhart,* (1918) 247 U. S. 251, and the *Child Labor Tax Case,* (1922) 259 U. S. 20, and which the individual was not free to accept or reject, are not present in this case. When, as here, only the powers of taxation, appropriation, and expenditure are exercised and there is no attempt to regulate, then there is no invasion of the field reserved to the States by the Tenth Amendment. For example, the powers of the States, within constitutional limits, to regulate production or to exert their own taxing, appropriation, and expenditure powers with respect thereto, or to authorize cooperative associations of producers or to regulate marketing of agricultural commodities within the State, are left untouched by the Federal Act.

Nor does the Act regulate or fix the prices of agricultural commodities. Its effect thereon flows from the exercise of the Federal powers just as the effect of the protective tariff taxes upon prices of domestic commodities domestically consumed flows from the power of the Federal Government to levy protective tariff taxes. Just as the cod fishery bounties referred to above (pp. 57 to 68) and numerous other appropriations of Congress do not regulate or coerce but merely afford the individual or the State an opportunity to accept or reject, so under the Agricultural Adjustment Act there is no regulation but only an offer of benefits which the individual may, of his own volition and in ac-

cordance with his own view as to his best economic interests, voluntarily accept or reject.

In *Ellis* v. *United States*, (1907) 206 U. S. 246, this Court had before it the Act of Congress limiting the hours of daily service of laborers and mechanics employed upon public works of the United States. The limitations were pursuant to the Government's powers of appropriation and expenditure as carried out through contracts between the Government and private contractors. As this Court said—

> "It is true that it [the Congress] has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to its general control • • • however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes." [P. 256]

Clearly, it would seem that the Congressional power of expenditure may, through contracts and conditions therein, affect matters that the States may regulate and that Congress may not regulate. That fact, however, does not invalidate such an exercise of the power of expenditure. Congress may attain such advantages as it deems for the general welfare, through expenditures pursuant to contracts that are made by the Government with those who voluntarily choose to enter into such contracts.

III

The Processing Tax Provisions Do Not Involve An Unconstitutional Delegation of Legislative Power

1. The contention that the processing tax provisions involve an unconstitutional delegation of legislative power is now immaterial because Congress has expressly ratified the assessment and collection of the taxes.

Amicus curiae has, in the foregoing portions of this brief, urged that the processing taxes are valid notwithstanding

the appropriation and expenditure provisions of the Act. The respondents contend, however, that the tax provisions of the Act are also invalid because of improper delegation of legislative power. (R. 28-29, Pars. 6, 7) It is the position of amicus curiae that, even assuming *arguendo* that such an improper delegation occurred, the contention has become immaterial by reason of the provisions of section 21(b) of the Agricultural Adjustment Act, added thereto by section 30 of the amendatory Act of August 24, 1935. These provisions are, in part, as follows:

> "(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective * * * prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes * * * are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. * * * Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment."

The quoted provisions were enacted by Congress subsequent to the decision of the Circuit Court of Appeals in this case and prior to the grant of the writ of certiorari herein by this Court. According to the statement of the House managers the quoted provisions make the "legalization and ratification effective as if there had been in existence, immediately prior to the occurrence of the particular action ratified and legalized, an act of Congress authorizing such action." (H. Rept. 1757, 74th Cong., 1st Sess., p. 34) The committees cited the decision of this Court in *United States* v. *Heinszen & Co.*, (1907) 206 U. S. 370, as authority for the exercise of such power by Congress. (H. Rept. 1241, 74th Cong., 1st Sess., p. 21; S. Rept. 1011, 74th Cong., 1st Sess., p. 23)

Significant statutory precedents for Congressional ratification of executive action are furnished by section 1 of the Emergency Banking Act of March 9, 1933 (48 Stat. 1), and by section 13 of the Gold Reserve Act of 1934 (48 Stat. 343). The President and the Secretary of the Treasury, during the monetary and banking crisis which existed in the early days of March, 1933, had, under color of section 5(b) of the Trading with the Enemy Act, issued orders and regulations of extensive scope and effect relating to the activities of banks and dealings in gold. There was grave question whether section 5(b) of the Trading with the Enemly Act had expired. Further, an examination of that provision will disclose the striking breadth of the power there conferred and the virtual absence of legislative direction to guide executive action. Under these circumstances, the first section of the first Act of the 73rd Congress provided as follows:

> "Section 1. The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed."

Sections 43 and 45 of Public No. 10, 73rd Congress, (48 Stat. 51-54) (the so-called "Thomas Amendment") conferred on the President various powers in connection with the monetary system of the country. These included the power to enter into agreements with Federal reserve banks, to conduct open market operations, to issue United States notes, to fix the weight of the gold dollar, to accept silver in payment of foreign debts, and to issue silver certificates. Section 13 of the Gold Reserve Act of 1934 not only "approved, ratified, and confirmed" actions, regulations, etc., taken or issued under those sections but also actions, regulations, etc., taken or issued under the Emergency Banking Act of March 9, 1933. That section reads as follows:

"Sec. 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

It is certainly reasonable to suppose that such recent and important examples of Congressional ratification of actions of the executive may well have been the models that served as a basis for the legalization and ratification provisions of the amended Agricultural Adjustment Act.

It is submitted that this case is to be decided by this Court in accordance with the law as in effect at the time of the decision by this Court, irrespective of the law at the time the case arose. (Cooley, "Constitutional Limitations", 8th ed. pp. 788-790) In *Rafferty* v. *Smith, Bell, & Co., Ltd.*, (1921) 257 U. S. 226, this Court reversed judgments requiring refunds of certain taxes, on the sole ground that the taxes were validated by a ratifying Act passed after those judgments but prior to the granting of a writ of certiorari by this Court.

The argument has been made, however, that Congress can not ratify that which it could not originally have authorized; that it could not originally have authorized an unconstitutional delegation of legislative power; and that, therefore, it can not ratify the taxes in question. It is the position of amicus curiae that (leaving aside the question of delegation of legislative power) the processing taxes are valid. Congress could have originally authorized the processing taxes. It could, therefore, validate such taxes if, as originally enacted, they were invalid by reason of some defect as to the form in which they were authorized. That this defect is a constitutional defect is immaterial. The legalization and ratification by Congress is not of the unconstitutional delegation of legislative authority but of the assessment and collection of taxes on the processing of certain agricultural

commodities at rates fixed by the Secretary of Agriculture. Whether or not the acts of the Secretary of Agriculture in fixing the particular rates of tax were valid and whether or not the acts of the Secretary of the Treasury and his subordinates in assessing and collecting the taxes at those rates were valid, when originally taken, is immaterial, for it is those acts that are now legalized and ratified.

Congress may legalize and ratify taxes, illegal when assessed and collected but assesed and collected under color of authority, if it could have imposed such taxes in the first instance and if at the time of legalization and ratification it still had the power to impose such taxes. (*United States* v. *Heinszen & Co.*, (1907) 206 U. S. 370; *Rafferty* v. *Smith, Bell, & Co., Ltd.*, (1921) 257 U. S. 226; *Hamilton* v. *Dillin*, (1875) 21 Wall. 73; *Mattingly* v. *District of Columbia*, (1878) 97 U. S. 687; *Tiaco* v. *Forbes*, (1913) 228 U. S. 549; *Charlotte Harbor & Northern Rwy.* v. *Wells*, (1922) 260 U. S. 8; *Hodges* v. *Snyder*, (1923) 261 U. S. 600; *Mascot Oil Co.* v. *United States*, (1931) 282 U. S. 434; *Boardman v. Beckwith*, (1865) 18 Iowa 292)

Taxes on the processing of cotton, at the rate of 4.2 cents per pound, were assessed and collected by the Secretary of the Treasury under color of authority. Congress could have, by express legislative provision, imposed such a tax in the first instance. Congress may, therefore, under the decisions cited, legalize and ratify a tax assessed and collected at such rate. By so doing it does not legalize or ratify its own action in unconstitutionally delegating legislative authority but legalizes and ratifies the actions of other Government officers, namely, the Secretary of the Treasury and the Secretary of Agriculture. The case of *Read* v. *City of Plattsmouth*, (1883) 107 U. S. 568, is in point. In that case the legislature of Nebraska ratified and validated certain bonds issued by the City of Plattsmouth and also ratified and validated taxes which had been imposed by the city to pay for the bonds. It was objected that the rati-

fication was not good on the ground that it violated the State constitutional provision forbidding the granting of corporate power by special Act of the legislature. This Court held that this objection was not well taken for the reason that corporate power was not granted by this ratification. The ratification did not give the city power to issue the bonds and levy the taxes but simply operated on the bonds and taxes themselves directly. This Court said—

> "Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority. * * *" [P. 576]

The fact that the original defect assumed for purposes of this argument flows from an unconstitutional delegation of legislative power does not prevent the exercise by a legislature of its power of legalization and ratification. As above stated, the legalization and ratification is not of the unconstitutional delegation of power but of the acts of the administrative officers taken under color of the delegated authority. While no decisions of this Court involving the precise situation have been found,[41a] recent decisions of the New York Court of Appeals do involve this situation.

[41a] A somewhat analogous situation was presented in *Burnet* v. *Aluminum Goods Mfg. Co.*, (1932) 287 U. S. 544. The Revenue Act of 1917 did not provide for consolidated returns by corporations. Nevertheless, regulations were issued under the Act by the Treasury Department (Regulations 41, Article 77) authorizing such returns. These consolidated return regulations were validated by section 1331 of the Revenue Act of 1921 (42 Stat. 227, 319) which provided that for the purpose of determining excess profits taxes the Revenue Act of 1917 "shall be construed to impose the taxes therein mentioned upon the consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year 1917." In the case above cited this Court apparently assumed the validity of section 1331 and regarded the regulations in question as having been ratified or validated. In *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner*, (1930) 43 F. (2d) 782 (C. C. A. 4th), section 1331 was specifically held constitutional.

The New York State emergency banking law (Laws of New York, 1933, c. 41, sec. 2) authorized the banking board to suspend any provision of the banking law in whole or in part and—

> "to adopt, rescind, alter and amend rules and regulations inconsistent with and in contravention of any law: (1) To safeguard the interests of depositors and stockholders in corporations and depositors with persons subject to the supervision of the banking department; (2) To prescribe and regulate methods of conducting business by such persons or corporation; (3) To prescribe what is for such persons and corporations a safe or unsafe condition for transacting business"

The legislature further provided, in section 3, that any "rule, or regulation of the banking board adopted or made pursuant to the * * * act shall supersede any provision of law inconsistent therewith". In *Moses* v. *Guaranteed Mortgage Company of New York*, (1934) 239 App. Div. 703, the Appellate Division held invalid, as an unconstitutional delegation of legislative power, the provisions of the Act of 1933 on which the banking board relied for authority to make the rules and regulations involved in the case. An appeal was taken from the decision of the Appellate Division to the Court of Appeals. However, prior to the decision of the Court of Appeals, the New York State legislature passed chapter 11 of the Laws of New York, 1934, which made more definite the authority devolved upon the banking board (section 2) and in section 4 provided—

> "All actions and/or omissions, prior to the passage of this act, taken or omitted to be taken in accordance with the suspensions, resolutions, rules and regulations of the banking board [superintendent of insurance] pursuant to the provisions of the chapter [i.e., the 1933 Act] amended by this act are hereby approved and confirmed, but only to the extent that such actions and/or

omissions have been in accordance with such suspensions, resolutions, rules and regulations.''

On appeal, the Court of Appeals reversed the judgment of the Appellate Division. (*Moses* v. *Guaranteed Mortgage Company of New York,* (1934) 264 N. Y. 476) The Court of Appeals rendered a per curiam opinion resting its decision on the authority of *Matter of People* (*Title & Mortgage Guarantee Company of Buffalo*), (1934) 264 N. Y. 69, decided by the court the same day.

The case referred to by the Court of Appeals in the per curiam opinion involved a proceeding by the State superintendent of insurance under Laws of New York, 1933, chapter 40, granting him a broad power to make rules and regulations which should supersede existing law inconsistent therewith—a power similar in its breadth to the one held invalid in the case of the banking board. The State legislature, however, had amended the 1933 insurance law so as to make more definite the authority devolved upon the superintendent of insurance and in section 6 of the amendatory Act (Laws of New York, 1934, c. 10) enacted ratifying provisions identical with those above quoted in the case of the banking board, except that the words ''superintendent of insurance'' were substituted for ''banking board''. Thereafter, the Court of Appeals, in the case referred to, sustained the validity of action taken pursuant to the authority granted the superintendent of insurance in the 1933 Act and stated that the 1934 amendments were such ''as to remove possible attack on such ground'', i. e., on the ground of improper delegation of legislative power.

The decisions of the Court of Appeals of New York State in the two cases seem authority for the following propositions: First, acts of administrative officers pursuant to color of authority of an Act involving an unconstitutional delegation of legislative power may be ratified by the legislature; second, such ratification is valid even if it occurs after the decision of a lower court holding the original stat-

ute invalid as an unconstitutional delegation of legislative power and the acts thereunder illegal, but prior to decision by a higher court on appeal; and, third, the case is to be decided in accordance with the law in force at the time of the appeal.

Furthermore, even though the legalizing and ratifying Act here in question were construed as a retroactive imposition of a tax on the processing of cotton at the rate of 4.2 cents per pound it would still be valid. A tax is not necessarily invalid because retroactively applied. (*Stockdale* v. *Atlantic Insurance Company of New Orleans,* (1874) 20 Wall. 323; *Billings* v. *United States,* (1914) 232 U. S. 261; *Brushaber* v. *Union Pacific R. R. Co.,* (1916) 240 U. S. 1; *Lynch* v. *Hornby,* (1918) 247 U. S. 339; *Hecht* v. *Malley,* (1924) 265 U. S. 144; *Milliken* v. *United States,* (1931) 283 U. S. 15) This is particularly true where the retroactive tax does not impose, as was said by this Court in *Lewellyn* v. *Frick,* (1925) 268 U. S. 238, 252, "an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways". The respondents conducted their business of manufacturing cotton knowing that a processing tax was imposed and being assessed and collected at least under color of authority of an Act of Congress.

The limitation upon delegation of authority to administrative officers is that Congress may not abdicate the essential legislative functions with which it is vested and permit others to determine matters of policy which it should itself determine. (*Panama Refining Co.* v. *Ryan,* (1935) 293 U. S. 388) The administrative officer may not be granted power to exercise unfettered discretion to make whatever laws he thinks may be needed. (*Schechter Poultry Corp.* v. *United States,* (1935) 295 U. S. 495) But where by legalization and ratification Congress adopts those acts as its own there is no abdication of essential legislative functions. By the legalizing and ratifying Act Congress resumes the exercise of its essential legislative

functions and no longer abdicates them. It exercises a curative authority that every legislature must possess if the functions of Government are not to be defeated through technical imperfections that occur from time to time in legislative action.

Up to September 30, 1935, the total tax proceeds pursuant to the provisions of the original Agricultural Adjustment Act amounted to $993,825,150.03. (See page 19, above) The amounts heretofore distributed as rental and benefit payments and the outstanding future commitments to make such payments, for the fiscal years 1934 to 1938, inclusive, totalled as of September 13, 1935, $1,376,017,274.[42] These tax proceeds have already been expended to reimburse the general funds of the Treasury for advances for rental and benefit payments. Additional tax collections will be necessary to meet the existing commitments for distribution of rental and benefit payments. The loss of the processing taxes as a source of receipts, through failure to recognize in Congress a power to legalize and ratify action taken under the law originally imposing those taxes, would mean a burden upon the Treasury to the extent that the taxes collected are refunded and to the extent that taxes due remain uncollected. The obligation of obtaining revenue for the refunds and for the existing commitments for distribution of rental and benefit payments not yet met, constitute moral obligations which Congress should meet and, under *United States* v. *Realty Co.*, (1896) 163 U. S. 427, would have power to meet. Such obligations could only be met by providing additional sources of revenue. The power of legalization and ratification by a legislature prevents the occurrence of such a situation and avoids the imposition of new tax burdens.

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[42] Publication of the Budget Section, Finance Division, Agricultural Adjustment Administration, entitled "Estimated Distribution of Rental and Benefit Payments by Months (Fiscal Years 1935 and 1936)", issued September 13, 1935.

2. Irrespective of the legalization and ratification provisions, there is no unlawful delegation of legislative power to determine the rate of tax or the time when the tax becomes effective or terminates.

For the purposes of the foregoing argument with respect to the provisions for the legalization and ratification of the processing taxes, it was assumed *arguendo* that the processing tax provisions involved an unlawful delegation of legislative power. The position of amicus curiae is that, on the contrary, the provisions involve no such delegation.

Congress gave extensive consideration to the question of delegation of legislative power with respect to the financing provisions of the various surplus control bills. This is quite evident in the committee reports with regard to those surplus control measures that provided for the equalization fee, the forerunner of the present processing tax.[43] With respect to the Agricultural Adjustment Act itself Congress obviously had in mind the decision of this Court in the Flexible Tariff Case (*J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394) when the House Committee on Agriculture in its report stated that "In their legal aspects these flexible tax provisions are similar to the provisions of the tariff act of 1930 providing for the flexible tariff". (H. Rept. 6, 73rd Cong., 1st Sess., p. 5)

(a) Rate of tax.

Section 9 of the Agricultural Adjustment Act provides as follows:

> "(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *

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[43] See H. Rept. 631, 68th Cong., 1st Sess., pp. 89-92; H. Rept. 1790, 69th Cong., 2nd Sess., pp. 28-29; H. Rept. 1141, 70th Cong., 1st Sess., p. 37; H. Rept. 1273, 70th Cong., 1st Sess., p. 37; S. Rept. 1304, 69th Cong., 2nd Sess., pp. 28-30; S. Rept. 500, 70th Cong., 1st Sess., p. 21.

> "(c) * * * the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2 [i.e., in case of cotton, the pre-war period, August 1909-July 1914]; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

The available statistics referred to were well known to Congress. Thus, the House Committee on Agriculture in its report on the National Emergency Bill, the immediate forerunner of the Agricultural Adjustment Act and the bill from which the processing tax provisions were taken, stated—

> "The pre-war purchasing power or fair exchange value of the commodity will be determined and proclaimed by the Secretary of Agriculture in accordance with index figures which he now maintains and publishes from time to time." [H. Rept. 1816, 72nd Cong., 2nd Sess., p. 5]

and the same committee in its report upon the Agricultural Adjustment Act stated that—

> "If the basic agricultural commodities were now at price levels which would give them at farm prices, a value equivalent to their pre-war purchasing power, the prices therefor would be approximately as set out in the following tables:" [H. Rept. 6, 73rd Cong., 1st Sess., p. 2]

The committee then set forth tables showing the average price of farm products received by producers on February 15, 1933, and the "parity price" (the popular name for the fair exchange value) for the same products as of the same date, computed on the basis of the index figures. (H. Rept. 6, 73rd Cong., 1st Sess., p. 2) Again, for instance, in the

hearings upon the National Emergency Bill before both the House and Senate committees there were set forth the index figures as to prices paid by the farmers for the commodities bought by them and the current average farm price for wheat, hogs, cotton, rice, tobacco, butter fat, and peanuts produced by them, and the "ratio price" (another popular name for the fair exchange value) for the same commodities."

Since January, 1908, the Department of Agriculture has collected at monthly intervals the current average farm price of various farm commodities, including cotton, and published them monthly since March, 1908 (R., Addendum 16); and the Department of Agriculture has also collected information on the prices of articles farmers buy for the period since 1909 and, since August, 1928, has published at quarterly intervals an index of prices based on this information (R., Addendum 18). These statistics have been collected and compiled according to a regularly established and unvarying procedure. This work is now done by the Bureau of Agricultural Economics of the Department. There is no possibility of confusion as to the statistics referred to by Congress for they are the official statistics used by the Department in its various activities. The statistics and the method of their collection and compilation did not originate with the Agricultural Adjustment Act but were in effect long prior thereto and are collected and compiled wholly independently of that Act. (R., Addendum 16-20) The record in this case shows that the statistics were collected and compiled in accordance with the established practice. (R., 11-12, Pars. 9, 12) The care with which the statistics are actually gathered and compiled is well set forth in the testimony of Nils Olsen, Chief of the

"Hearings before the Committee on Agriculture, House of Representatives, 72nd Cong., 2nd Sess., entitled "Agricultural Adjustment Program", December 14-20, 1932, pp. 27-29; Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 72nd Cong., 2nd Sess., January 25-February 6, 1933, entitled "Agricultural Adjustment Relief Plan", pp. 101-106.

Bureau of Agricultural Economics, Department of Agriculture, in the addendum to the record in this case, pages 16-20.

In the provisions of section 9(b) and (c), quoted above, Congress required only a simple mathematical computation for ascertaining the fair exchange value of a commodity such as cotton. The processing tax rate becomes a mere matter of subtraction of the current average farm price for the commodity from the figure for its fair exchange value. There is no contention that the processing tax rate for cotton was not in accordance with the Act, and an allegation to the effect that it was not was stricken from the receivers' report upon the receivers' own motion. (R. 8-9)

The computation of the fair exchange value for cotton, for instance, is made as follows: The current average farm price for cotton during the period August, 1909-July, 1914, is multiplied by the current index of the prices farmers pay for commodities bought by them. Thus, as stated by the Secretary of Agriculture in testifying before the Senate Committee on Agriculture and Forestry—

> "The price of things which farmers are buying today costs them about 104 percent of that basic period. [i. e., 1909 to 1914] The price of wheat in the basic period was, we will say, 90 cents; 104 percent of 90 cents would be, roughly, 94 cents. That is the way in which we ascertain it [i. e., the fair exchange value]."[48]

The processing tax rate is therefore the difference between the two figures, fair exchange value and current average farm price; and these figures are obtained not through estimates or predictions but through careful ascertainment of past facts in accordance with a regularly established and unvarying procedure. The past facts are capable of accurate ascertainment far more so, for instance,

[48] Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 73rd Cong., 1st Sess., March 17-28, 1933, entitled "Agricultural Emergency Act to Increase Farm Purchasing Power", p. 25.

than such factors as "market value" and "cost of production" which are necessary to the computation of many income taxes and tariff rates under existing law. Such factors as cost of production are admittedly incapable of precise ascertainment. (*Hampton, Jr., & Co.* v. *United States*, (1927) 14 Ct. Cust. Appls. 350)

Adjustments in the tax rate.—Section 9(a) of the Act provides that the rate for processing taxes shall be determined by the Secretary of Agriculture as of the date the tax first takes effect and that the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him in conformity with the formula laid down in section 9(b) and (c). This adjustment would take account of any change in the farm price of cotton and in the price paid by farmers for articles bought by them. Section 9(b) also directs that, if the Secretary has reason to believe that the tax at the rate computed in accordance with the formula will cause such reduction in the quantity of the commodity or products thereof domestically produced as to result in the accumulation of surplus stocks thereof or in the depression of farm price of the commodity, then he shall, if after investigation and hearing he finds such result will occur, reduce the rate to such rate as will prevent the accumulation of surplus stocks and depression of the farm price of the commodity.

The Secretary of Agriculture has not, under either of the foregoing provisions, taken any action to adjust the rate of the processing tax on cotton. The question of the validity of these provisions is not here strictly involved. The provisions for determining the rate of tax are wholly separable from the remaining provisions of the Act and without them the Act would be effective to accomplish the Congressional objectives, as is demonstrated by the failure to date to act under them. Furthermore, the taxes involved in the present case would not be affected by any such adjustment if hereafter made by the Secretary of Agriculture

and, in the case of an adjustment hereafter made under section 9(b) to prevent accumulation of surplus stocks or depression of the farm price, the adjustment would have to be made in accordance with the new provisions of that section as amended which have now superseded the provisions of the original section. (See section 12 of the amendatory Act of August 24, 1935)

In any event, however, it is submitted that these provisions for the adjustment of the processing tax rate are fully within the decisions of this Court in *J. W. Hampton, Jr. & Co.* v. *United States*, (1928) 276 U. S. 394, and *Marshall Field & Co.* v. *Clark*, (1892) 143 U. S. 649, in which cases far broader delegations of power, in fact, than those involved here were sustained by this Court in connection with tax rates.

(b) THE TIME THE TAX BECOMES EFFECTIVE.

(1) *The marketing year.*—Section 9(a) provides that processing taxes shall be in effect with respect to the commodity from the beginning of the marketing year and that—

> "The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture."

This provision merely requires the ascertainment of a well-known trade fact. The marketing year for cotton commences August 1st and the date is widely accepted. (R. 11, Par. 11; R., Addendum 21-22) The date is also recognized by Congress in the cotton statistics Act of March 3, 1927. (44 Stat. 1372)

(2) *The determination that rental or benefit payments are to be made.*—The particular marketing year on which a processing tax is to commence with respect to a basic agricultural commodity is the marketing year next following the date of the proclamation by the Secretary of Agriculture of his determination "that rental or benefit payments

are to be made'' with respect to such basic agricultural commodity. (Sec. 9(a))

The processing tax thus takes effect automatically upon the beginning of the marketing year next following a readily ascertainable fact, namely, the issuance of the proclamation of a prescribed character by the Secretary of Agriculture.

The reason for tying up the imposition of taxes with the making of expenditures for rental or benefit payments is obvious. The intent of Congress that the agricultural adjustment programs should be self-financing and should not be the cause of an unbalanced budget has been explained in the foregoing pages of this brief. (See pages 10 and 11) Congress was in this position: If no expenditures were to be made by way of rental or benefit payments to cotton farmers, for instance, then no taxes were necessary to produce revenue to meet these expenditures. If such expenditures were made, however, then the budget would be unbalanced and the general funds of the Treasury would be called upon to meet the expenditures unless in conjunction therewith adequate taxes came into operation. The Secretary of Agriculture was, in effect, prohibited from spending unless at the same time his program with respect to the particular commodity recognized that processing taxes would automatically come into effect upon the processing of that commodity. The tying together of the expenditure and tax provisions is therefore a limitation upon the Secretary's discretion in making expenditures. Expenditures and taxes should, in the judgment of Congress as evidenced in the Act, be required to go hand in hand. The coming into effect of the processing taxes was therefore made automatically dependent upon the coming into effect of the expenditures for rental and benefit payments.

In the view of the Circuit Court of Appeals, however, this inter-relation of expenditure and taxation constituted an invalid delegation of legislative power. The argument seems to be that, while the imposition of the taxes upon the

processing of a commodity depended automatically upon the making of expenditures with respect to that commodity, the discretion to make the expenditure was not adequately limited by Congress and was an invalid delegation of power. Therefore, the power of taxation being dependent upon an invalid delegation of legislative power to make expenditures, the taxation provisions are in consequence invalid.

This argument fails to recognize that the discretion resting in an executive officer to determine the amount, time, method, and objects of an expenditure to be made by the executive within the limits of the total amount of the appropriation and the time, method, and objects thereof as presented in the appropriation law is not a legislative, but an executive, power. The exercise of such discretion, therefore, does not constitute a delegation of power, much less an unconstitutional delegation of legislative power.

The history of the legislative power of appropriation demonstrates the executive character of the function of expenditure. In *State* v. *Moore,* (1896) 50 Neb. 88, this history is summarized—

> "The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. * * * When our governments, state and federal, came to be established, the requirement of legislative appropriations was adopted from England, * * *"
> [Pp. 94-96]

The Constitution provides (Art. I, Sec. 9, Clause 7) that—

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *"

The constitutional provision limits the executive function of expenditure by the prerequisite of Congressional action through an appropriation, including by implication such limitations as Congress may choose to place upon the appropriation as regards amount, method, objects, and time of expenditure.[46]

> "An appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the Treasury. * * *" [*Campagna* v. *United States,* (1891) 26 C. Cls. 316, 317]

The constitutional provision limits the executive discretion with respect to expenditures as exercised by the President through those officers who have duties with respect to the custody and disbursement of the public moneys. (See page 30, above)

The fact that the Constitution vests in the Congress the duty of restricting the right of expenditure to expenditures made pursuant to an appropriation does not make the power of expenditure a legislative power. Within the limits of the appropriation as to amount, method, objects, and time of expenditure, the executive function of expenditure remains uncontrolled.

And there must necessarily be discretion in the executive with regard to expenditures if the Government is adequately to function. It is impracticable for Congress to prescribe in minute detail the time when a particular expenditure is

[46] Of course, irrespective of the action of Congress, no appropriation for raising and supporting armies is available for expenditure for a period of more than two years after the date of the appropriation. (Constitution, Art. I, Sec. 8, Clause 12)

to be made and the method to be employed in making the expenditure and the detailed items of the object of expenditure. The object, the method, and the time must be expressed in general terms. The constitutional requirement of appropriation is a check to be exercised by Congress in such detail as it deems necessary to prevent an otherwise uncontrolled executive power of expenditure once revenue has been provided. Supervision over the executive in his observance of such limitations on expenditure as are imposed by Congress through its appropriating function are limited by Congress to the functions vested by Act of Congress in the Comptroller General of the United States and by the rules of the respective Houses to those several committees that have jurisdiction over expenditures in the executive departments. These are the safeguards set up by Congress and they in no wise restrict the discretion of the executive within the limits of the terms of the appropriation.

Further, the discretion in the executive to make expenditures is not a private right as to the exercise of which the respondents may complain and as to which the judicial powers of courts of the United States extend under Article III of the Constitution. The executive discretion as to expenditures involves a matter of public right which Congress may or may not see fit to present in such form that the judicial power is capable of acting on it. Thus, in *Murray* v. *The Hoboken Land & Improvement Co.*, (1856) 18 How. 272, Mr. Justice Curtis said—

> "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. * * *" [P. 284]

Congress has not seen fit to present public rights with regard to executive discretion in making expenditures, in

such form that the courts may take cognizance of them.

The question then arises—are taxing provisions invalid as a delegation of legislative power if the imposition of the tax is made to depend automatically upon the exercise of the executive function of expenditure? The time of imposition of a particular tax rate has heretofore been made to depend upon the exercise of executive functions. Thus, under section 3 of the Tariff Act of 1890, held valid by this Court in *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649, the time of imposition of a particular rate of tax depended on the President's being satisfied that the government of any country producing and exporting sugars, etc., was imposing duties or other exactions upon agricultural or other products of the United States which "he may deem to be reciprocally unequal and unreasonable". Upon the issuance by the President of a proclamation to that effect, the new tax came into operation. This Court said that the law implied that the President would examine the commercial regulations of other countries producing and exporting sugar and form a judgment as to whether they were reciprocally equal and reasonable or the contrary in their effect upon American products. This function of ascertaining the facts and forming a judgment clearly is not a legislative function. It is an executive function when performed by an executive officer. And in section 315 of the Tariff Act of 1922, held valid by this Court in *J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394, the time of imposition of the flexible tariff duties depended on executive action. The Tariff Commission was required to make certain investigations, and thereafter the President fixed and established the new rate "whenever the President upon investigation" ascertained the existence of certain differences in costs of production not equalized by existing tariff duties. It was only when these two executive acts had been performed that the time for the imposition of the new duty arrived. As this Court said—

> "There was no specific provision by which action by the President might be invoked under this act, but it was presumed that the President would through this body of advisors keep himself advised of the necessity for investigation or change and then would proceed to pursue his duties under the act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary." [P. 405]

No rule or standard at all was laid down as a guide when to exercise these preliminary executive functions under the two Tariff Acts. This was left to the discretion of the President in assisting Congress to carry out the policy of the Tariff Acts.

So, under the Agricultural Adjustment Act, it must be presumed that the Secretary of Agriculture will exercise his executive function of expenditure, within the limitations of the appropriation, as and when he is of the opinion that expenditures for rental and benefit payments are necessary in order to effectuate the declared policy of the Act. It is submitted that if new tariff duties can come into effect by reason of the exercise of an executive function which Congress may invoke, then processing taxes may come into effect upon the exercise of the executive function of expenditure which Congress has invoked.

As was said by this Court further in the *Hampton* case—

> "This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." [P. 406]

Congress has in the Agricultural Adjustment Act invoked the assistance of the executive in part through the

use of its function of expenditure. It invokes that assistance in order to carry out the policy of the Act. It also invokes that assistance in order to specify the time when the processing taxes shall become operative. This involves no delegation of legislative power. The processing tax is effective automatically with respect to a particular commodity whenever the Secretary of Agriculture has exercised his executive function of proclaiming that he will make expenditures for rental and benefit payments with respect to that commodity. The considerations which lead the Secretary to exercise that executive function within the limits prescribed by the Act are considerations unrelated to taxation. Even though the Act provided for no taxes or the taxes under the Act were invalid, he would continue to exercise the executive function of expenditure and make expenditures within the limit of funds made available to him.

The State statute considered by this Court in *Michigan Central R. R. Co.* v. *Powers,* (1906) 201 U. S. 245, provided that the rate of taxation on railroad property should be the average rate of taxation on all other property subject to ad valorem taxes, to be ascertained by dividing the total tax levy on all such property by the value of the property. The average rate of taxation on all other property subject to ad valorem taxes depended, in part, upon the exercise of the discretion of local assessors in making local property assessments and, in part, upon the mathematical computation of the average by the State board of assessors. This Court held the statute valid and, in discussing the objection raised of delegation of legislative functions, it said—

> "It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, *by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate,* there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate." [P. 297—Italics supplied]

If the rate of taxation may be made to depend upon executive action taken by assessment officers of the State in another connection, it is submitted that the time when a rate of taxation becomes effective may likewise depend upon executive action. And in the *Michigan Central* case this Court also said—

> "It is true there is a possibility that some local board may be actuated by other than a sense of duty to the community for which it is acting, and have a thought of the ultimate effect [of its assessments] upon the railroad rate. There is always a possibility of misconduct on the part of officials, but legislation would be seriously hindered if it may not proceed upon the assumption of a proper discharge of their duties by the various officials. * * *" [P. 295]

It is true that the policy declared in the Act is one of the limitations imposed by Congress upon the expenditure by the Secretary of Agriculture, in the form of rental or benefit payments, of the funds appropriated by the Act. But the precision of that rule is immaterial. There is no question of delegation of legislative power but only a question of the extent to which Congress chooses to impose limitations upon the executive power of an executive officer to expend moneys appropriated. That matter is one for Congress alone to decide and, having decided it, the discretion remaining in the Secretary of Agriculture is an executive function for him to exercise as he deems appropriate in effectuating the Congressional policy. No question is raised here that the Secretary, in the exercise of his discretion, has not made his expenditures in such manner as to carry out that policy. Having acted within the limits imposed by Congress upon the expenditure of the funds appropriated, whether or not those limitations be precise or indefinite, the Secretary has performed the duty as to which Congress invoked his assistance.

(c) THE TIME THE TAX TERMINATES.

Section 9(a) of the Act provides that—

> "The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * * ".

The considerations governing the constitutional validity of this provision are similar to those involved in the constitutional validity of the provisions relating to the time the processing tax takes effect. Further discussion is not necessary here, except to point out that the question is not strictly before this Court inasmuch as no action has been taken by the Secretary of Agriculture with respect to the termination of the processing tax upon cotton. Furthermore, the determination of the Secretary to cease the expenditure of funds for a particular purpose would in no wise injure the respondents and they should not be heard to complain of this prospective exercise of executive discretion.

CONCLUSION

It is submitted that the legislation providing for the processing taxes imposed upon the respondents constitutes a valid exercise of the authority placed in Congress by the Constitution. The taxes are valid excises, uniform, and not in violation of the Fifth Amendment, considered separately from the use made of their proceeds. The taxes, as such, being valid, respondents have no right to question their validity from the standpoint of the use made of their proceeds. However, the expenditure provisions of the Act are for the general welfare and, therefore, the taxes are levied for the general welfare. The Act involves no improper delegation of legislative power and even if there had been

that constitutional defect has been corrected by the legalization and ratification of the taxes assessed and collected by the Treasury officers. Neither the imposition of the tax nor the use made of its proceeds violates the Tenth Amendment.

WHEREFORE it is urged that the decision below should be reversed.

Respectfully submitted,

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November, 1935.

APPENDIX I

Text of Statutes Involved

A. Agricultural Adjustment Act,[1] *c. 25, 48 Stat. 31:*

AN ACT

To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—AGRICULTURAL ADJUSTMENT

DECLARATION OF EMERGENCY

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

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[1] Section 8(a) of the National Industrial Recovery Act, c. 90, 48 Stat. 195, provided that Title I of the Act of May 12, 1933, might "for all purposes" be thereafter referred to as the "Agricultural Adjustment Act".

From time to time certain of the sections set out herein have been amended. The amendments deemed material to a consideration of this case are indicated herein by footnotes.

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914.

* * * * * * * *

PART 2—COMMODITY BENEFITS

GENERAL POWERS

SEC. 8. In order to effectuate[2] the declared policy, the Secretary of Agriculture shall have power—

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers

[2] Error in enrolling of original.

or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments.

* * * * * * * *

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the au-

thority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. In computing the current average farm price in the case of wheat, premiums paid producers for protein content shall not be taken into account.

(c) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.

(d) As used in part 2 of this title—

(1) In case of wheat, rice, and corn, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, rice, or corn for market,

including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

(3) In case of tobacco, the term "processing" means the manufacturing or other processing (except drying or converting into insecticides and fertilizers) of tobacco.

(4) In case of hogs, the term "processing" means the slaughter of hogs for market.

(5) In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for market, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

(e) When any processing tax, or increase or decrease therein, takes effect in respect of a commodity the Secretary of Agriculture, in order to prevent pyramiding of the processing tax and profiteering in the sale of the products derived from the commodity, shall make public such information as he deems necessary regarding (1) the relationship between the processing tax and the price paid to producers of the commodity, (2) the effect of the processing tax upon prices to consumers of products of the commodity, (3) the relationship, in previous periods, between prices paid to the producers of the commodity and prices to consumers of the products thereof, and (4) the situation in foreign countries relating to prices paid to producers of the commodity and prices to consumers of the products thereof.

MISCELLANEOUS

SEC. 10. * * *

* * * * * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(d) The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

(e) The action of any officer, employee, or agent in determining the amount of and in making any rental or benefit payment shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam.

* * * * * * * *

COMMODITIES

SEC. 11.[3] As used in this title, the term "basic agricultural commodity" means wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, and any regional or market classification, type, or grade thereof; but the

[3] "Sugar beets and sugarcane" were added to this list by Sec. 1 of the Jones-Costigan Sugar Act, c. 263, 48 Stat. 670; "cattle" by Sec. 1, "peanuts" by Sec. 3 (b), "rye, flax, and barley" by Sec. 4, and "grain sorghums" by Sec. 5 of the Jones-Connally Cattle Act, c. 103, 48 Stat. 528; "potatoes" by Sec. 61 of the Act approved August 24, 1935.

Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, marketing, and consumption are such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof.

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

(b)[4] In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate

[4] Section 3 of the Act of August 24, 1935 (Public 320, 74th Cong., 1st Sess.) amended the first sentence of this subdivision to read as follows:

"In addition to the foregoing, for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from all taxes imposed under this title is hereby appropriated to be available to the Secretary of Agriculture for (1) the acquisition of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to cooperate with a program of production adjustment or marketing adjustment adopted under the authority of this title, and (2) the following purposes under part 2 of this title: Administrative expenses, payments authorized to be made under section 8, and refunds on taxes."

from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection.

TERMINATION OF ACT

SEC. 13. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

SUPPLEMENTARY REVENUE PROVISIONS

EXEMPTIONS AND COMPENSATING TAXES

SEC. 15. (a) If the Secretary of Agriculture finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that any class of products of any commodity is of such low value compared with the quantity of the commodity used for their manu-

facture that the imposition of the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary of Agriculture shall so certify to the Secretary of the Treasury, and the Secretary of the Treasury shall abate or refund any processing tax assessed or paid after the date of such certification with respect to such amount of the commodity as is used in the manufacture of such products.

(b) No tax shall be required to be paid on the processing of any commodity by or for the producer thereof for consumption by his own family, employees, or household; and the Secretary of Agriculture is authorized, by regulations, to exempt from the payment of the processing tax the processing of commodities by or for the producer thereof for sale by him where, in the judgment of the Secretary, the imposition of a processing tax with respect thereto is unnecessary to effectuate the declared policy.

(c) Any person delivering any product to any organization for charitable distribution or use shall, if such product or the commodity from which processed, is under this title subject to tax, be entitled to a refund of the amount of any tax paid under this title with respect to such product so delivered.

(d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the

processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity.

(e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided*, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively, to be used and expended by the governments thereof for the benefit of agriculture. Such tax shall be paid prior to the release of the article from customs custody or control.

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale

or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within thirty days thereafter. The tax refund or abatement provided in subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held on the date the processing tax is wholly terminated.

EXPORTATIONS

SEC. 17. (a) Upon the exportation to any foreign country (including the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or in chief value from a commodity with respect to which a tax has been paid under this title, the exporter thereof shall be entitled at the time of exportation to a refund of the amount of such tax.

(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any

person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or in chief value therefrom.

EXISTING CONTRACTS

SEC. 18. (a) If (1) any processor, jobber, or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this title, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole of such tax, then (unless the contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this title. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee.

COLLECTION OF TAXES

SEC. 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

(b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: *Provided*,

That the Secretary of the Treasury is authorized to permit postponement, for a period not exceeding ninety days,[6] of the payment of taxes covered by any return under this title.

(c) In order that the payment of taxes under this title may not impose any immediate undue financial burden upon processors or distributors, any processor or distributor subject to such taxes shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act.

B. Section 30 of Public 320, 74th Cong., 1st Sess., approved August 24, 1935:

SEC. 30. The Agricultural Adjustment Act, as amended, is amended by adding after section 20 the following new section:

"SEC. 21. (a) * * *

"(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, deter-

[6] By section 2 of Public 62, 74th Cong., 1st Sess., the Secretary may in his discretion extend this period to not exceeding six months.

mination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

"(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and the initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

* * * * * * * *

APPENDIX II

Legislative History of the Agricultural Adjustment Act

There is set forth in this appendix, in chronological sequence, according to Congresses, the various bills favorably acted upon by the committees of Congress and involving the fundamental principle of the Agricultural Adjustment Act, namely, control of surplus production of agricultural commodities and the financing of the operations in connection therewith. There are also listed the various committee reports and Congressional hearings and investigations in connection with these bills. These bills, reports, hearings, and investigations are those referred to in the discussion in this brief under the heading "Summary of Legislative History", pages 4 to 11.

68th Congress, 1st Session:

Original McNary-Haugen (Equalization Fee) Bill—Proposed legislation first introduced in Congress January 16, 1924. S. 2012 by Senator McNary, Chairman of the Committee on Agriculture and Forestry of the Senate, and H. R. 5563 by Representative Haugen, Chairman of the Committee on Agriculture of the House of Representatives.

Following extensive hearings (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Purchase and Sale of Farm Products", January 7-26, 1924), the Senate bill was reported to the Senate. (S. Rept. 193, March 1, 1924) When this measure was reached on the Senate calendar its consideration was indefinitely postponed (65 Cong. Rec. 6760, April 21, 1924) at the request of the chairman of the committee, inasmuch as the committee had in the meantime given further consideration to the legislation and reported to the Senate a substitute bill. (S. 3091, accompanied by S. Rept. 410, April 16, 1924)

The House bill was also reported in a revised form (H. R. 9033, accompanied by H. Rept. 631, May 2, 1924) after full hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "McNary-Haugen Bill", January 21-March 19, 1924) but was rejected by a vote of the House. (65 Cong. Rec. 10341, June 3, 1924)

The principal features of these bills are set forth above in the main text of the brief, pages 8 to 9.

Prior to the consideration of this legislation by either committee, there had been a comprehensive study of the agricultural situation made during the 67th Congress by the Joint Senate and House Commission of Agricultural Inquiry. See, particularly, Part I, Report of the Joint Commission of Agricultural Inquiry entitled "The Agricultural Crisis and its Causes", H. Rept. 408, 67th Cong., 1st Sess. Part II of the report relates to credit, Part III to transportation, and Part IV to marketing and distribution.

The committees also had before them the report of the National Agricultural Conference, called at the direction of President Harding, which advocated, among other matters, Congressional and Presidential steps "to immediately reestablish a fair exchange value for all farm products with that of all other commodities". (H. Doc. 195, 67th Cong., 2nd Sess., p. 186)

Also in the 67th Congress, 2nd Session, the Committee on Agriculture and Forestry, U. S. Senate, held hearings on the agricultural situation, entitled "Stabilizing the Prices of Certain Agricultural Products", January 26-March 22, 1922.

68th Congress, 2nd Session:

Following further hearings (Joint hearings before the Committee on Agriculture and Forestry, U. S. Senate, and the Committee on Agriculture, House of Representatives, entitled "The McNary-Haugen Bill", January 21, 1925; Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricutural Relief", February 2-19, 1925), the legislation was again reported to the House and Senate by the respective committees. (S. 4206, accompanied by S. Rept. 1234, February 26, 1925; H.R. 12390, accompanied by H. Rept. 1595, February 26, 1925) The revised bills eliminated two principal objections urged against the original bill, by requiring purchases of surpluses to be made at the market, rather than the ratio or parity, price and by eliminating incidental authority that had been given to the President to increase tariff duties. No action was taken on the legislation by either House.

69th Congress, 1st Session:

The surplus control legislation was again reported to the Senate by its committee as an amendment to the Co-operative Marketing Bill (H.R. 7893, accompanied by S. Rept. 664, April 13, 1926) but was rejected by vote of the Senate. (67 Cong. Rec. 11872, June 24, 1926) Additional hearings had previously been held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "To Promote Cooperative Marketing", March 5-23, 1926; Hearings before Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Relief", March-April, 1926)

The House committee also held further hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 15-April 21, 1926) and thereafter reported a new bill. (H.R. 11603, accompanied by H. Rept. 1003, April 27, 1926) This bill was rejected by vote of the House. (67 Cong. Rec. 9863, May 21, 1926)

The bills in this session substituted a Federal Farm Board for the corporation, provided for removal of surpluses to foreign markets through agreements with agricultural cooperative associations and reimbursement of their losses from the equalization fees, and declared the fee to be a regulation of commerce.

69th Congress, 2nd Session:

The "First" McNary-Haugen Bill—The House committee held hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 7-10, 1927) and thereafter reported to the House H.R. 15474, accompanied by H. Rept. 1790, January 18, 1927.

The Senate committee reported S. 4808, accompanied by S. Rept. 1304, January 24, 1927, which passed the Senate. The Senate committee also held hearings. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Relief", January 18-20, 1927)

The House passed without amendment the Senate bill in lieu of the bill reported by the House Committee. (68 Cong.

Rec. 4099, February 17, 1927) The former bill eliminated the import embargo feature and, in consequence, and also in order to avoid the charge of "price fixing", the ratio or parity price provisions. Purchases of surpluses were to be made pursuant to a declared policy to promote orderly marketing, prevent excessive market fluctuations, and preserve advantageous domestic markets.

The bill was vetoed by President Coolidge. (68 Cong. Rec. 4771, February 25, 1927; S. Doc. 214) The President accompanied his veto message with an opinion rendered by Attorney General Sargent. The Attorney General held that the purpose and direct effect of the bill was to fix prices for agricultural commodities, that this was beyond the power of the Congress under the commerce clause, that whether or not the equalization fee was a tax it constituted a taking of property without due process of law, and that both the marketing operations and the equalization fee involved unconstitutional delegations of legislative power. (Cf., speech of Representative L. J. Dickinson of Iowa upon the veto message, 68 Cong. Rec. 5448-5454, March 2, 1927)

70th Congress:

The "Second" McNary-Haugen Bill—Further hearings were held by the House committee. (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 17-February 24, 1928) The committee reported the bill, H.R. 12687, accompanied by H. Rept. 1141, April 5, 1928.

The Senate committee reported the bill, S. 3555, accompanied by S. Rept. 500, March 8, 1928. Both House and Senate bills had been revised to meet some of the Presidential objectons set forth in the veto message. For example, the bills were made applicable to all, instead of merely basic, agricultural commodities, special provision was made for perishables, and the equalization fee was applied to competitive imported food products. In addition, as an initial alternative, provision was made for loans to agricultural cooperative associations to carry out the purposes of the Act unless such loans were found to be ineffective to that end. The Senate bill passed the Senate, but the House committee substituted and reported the text of the House bill.

(H. Rept. 1273) As so amended the bill was passed by the House. In conference a final revised bill was agreed to by the conference committee and passed by both Houses. (H. Rept. 1620, May 12, 1928)

This bill was also vetoed by President Coolidge. (69 Cong. Rec. 9524, May 23, 1928; S. Doc. 141) The veto message was again accompanied with an opinion of the Attorney General. (Cf., speech of Representative L. J. Dickinson of Iowa upon the second veto message, 69 Cong. Rec. 10780-10785, May 29, 1928)

71st Congress:

The Farm Board Act (*Agricultural Marketing Act*)—Additional hearings were held. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Farm Relief Legislation", March 25-April 12, 1929; Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", March 27-April 4, 1929) Thereafter, a bill (H.R. 1) was reported to the House (H. Rept. 1, April 17, 1929) and a bill (S. 1) reported to the Senate (S. Rept. 3, April 23, 1929).

The House bill was passed but in the Senate a new text was substituted and passed. A substitute for both the House bill and Senate amendment was agreed to by the conference committee (H. Rept. 18, June 6, 1929) but rejected by vote of the Senate. (71 Cong. Rec. 2661, June 11, 1929) A further substitute agreed to by a conference committee (H. Rept. 21, June 14, 1929) was passed by both Houses and approved by the President June 15, 1929. (46 Stat. 11)

Under the Act a Federal Farm Board was created. It could undertake surplus control operations through loans to specially-created commodity stabilization corporations controlled by agricultural cooperative associations. The corporations were guaranteed against loss. A half-billion dollar appropriation was provided for the purposes of the Act. No equalization fees or special taxes were provided to raise the necessary revenue for the Treasury. The operations were to be conducted in furtherance of a declared policy to promote effective merchandising of agricultural commodities so that agriculture would be on a basis of economic equality with other industries and to that end, among

other matters, so as to aid in preventing and controlling surpluses through orderly production and distribution.

The Export Debenture Plan—First introduced in the 69th Congress, 1st Session, by Senator McKinley (S. 2289, January 7, 1926) and Representative Adkins (H.R. 7392, January 11, 1926); also in revised form in the 70th Congress, 1st Session, by Representative Jones (H.R. 10762, February 9, 1928), Representative Ketcham (H.R. 12892, April 11, 1928; see H. Rept. 1141, Part 3, April 11, 1928, which accompanied H.R. 12687), and Representative Jones (H.R. 12893, April 11, 1928). It was passed by the Senate as an additional feature of the Farm Board Act but rejected in conference. It was opposed by President Hoover. (See his letter to Senator McNary April 20, 1929, S. Rept. 3, 71st Cong., 1st Sess., pp. 15-17) The plan as passed by the Senate provided for diversion of surplus agricultural commodities to foreign markets at the world price by the issuance of export debentures to exporters of such commodities or their products. These debentures were a form of currency which would be legal tender for payment of customs duties. The debentures equaled one-half the tariff duty on the commodity and 2 cents per pound on cotton, with authorization for reduction in rate to meet increase in production. In effect, the debentures were financed through the customs duties, these taxes being payable in the debentures issued the exporters, thus depriving the Treasury of its full receipts from customs duties.

72nd Congress, 1st Session:

The "Three-Way" Bill—This bill (S. 4536) proposed to amend the Farm Board Act by adding to it as alternatives the equalization fee plan and the export debenture plan (both set forth above) and the compulsory allotment plan. This latter plan provided for segregation of that portion of a farmer's production of an agricultural commodity for any year needed for domestic consumption. Purchasers of agricultural products were required to be licensed and to pay for this domestic allotment the cost of production thereof as proclaimed by the Farm Board. Failure to so pay constituted a criminal offense. Surpluses were controlled indirectly through the compulsory payment of a higher price for the domestic allotment than for the surplus to be ex-

ported or withheld from market or otherwise disposed of off the domestic market by the Farm Board and through automatic decrease of the domestic allotment as production increased. An earlier bill using the "cost of production" formula was the Crisp bill, H.R. 15963, 69th Cong., 2nd Sess. (See H. Rept. 1790, accompanying H. R. 15474, 69th Cong., 2nd Sess., pp. 2-4)

The bill (S. 4536) was reported to the Senate by the Senate committee (S. Rept. 732, May 25, 1932) but subsequently recommitted. (75 Cong. Rec. 13000, June 15, 1932)

Hearings were held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Farm Relief Bills, Pertaining to Agricultural Marketing, Abolishing Federal Farm Board and Others", April 26-29, 1932; Hearings before the Committee on Agriculture, House of Representatives, entitled "Farm Marketing Program", February 16-18, 1932, and May 4, 11 and 25, 1932)

72nd Congress, 2nd Session:

The National Emergency Bill—Following extended hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932), the House committee reported the bill, H.R. 13991, accompanied by H. Rept. 1816, January 3, 1933. The bill was passed by the House and reported by the Senate committee (S. Rept. 1251, February 20, 1933) but failed of Senate action before expiration of the Congress on March 4, 1933. Hearings were also held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Adjustment Relief Plan", January 25-February 6, 1933)

The bill provided for estimating, on the basis of Government statistics of production and consumption, the percentage of certain basic crops that would be needed for domestic consumption. Each producer was to be given a benefit payment on the same percentage of his "crop marketed" (as reported to the Senate this was changed to "crop produced"). The payment was to equal the difference between the current national average farm price for the commodity and its fair exchange value (parity price)

computed substantially the same as under the present Agricultural Adjustment Act. The payments were to be financed by a processing tax similar to that under the present Act. As passed by the House, the benefit payment to any producer was conditioned upon his reducing acreage in accordance with amounts prescribed by the Secretary of Agriculture. Surplus control also resulted indirectly from the fact that payments would not be made on that portion of production over domestic requirements. The plan was voluntary, gave emphasis to reduction of production, provided a processing tax so as to finance itself, and established a parity price. Much of the present Act, introduced in Congress within a month after the National Emergency Bill was reported to the Senate, is obviously adapted from it.

73rd Congress:

The Agricultural Adjustment Act—Introduced in House and reported to House (H. R. 3835, accompanied by H. Rept. 6, March 20, 1933) following message to Congress by President Roosevelt on March 16, 1933. The message is set forth on page 1 of the House report.

Passed by House March 22, 1933, reported to Senate (S. Rept. 16) April 5, 1933, and passed by Senate with amendments April 28, 1933. Report of conference committee (H. Rept. 100, May 5, 1933) was agreed to by both Houses and, on May 12, 1933, bill was approved by President. (48 Stat. 31)

The House report (H. Rept. 6, p. 2) refers to House and Senate committee hearings of the preceding session and also to hearings before the Committee on Finance, U. S. Senate, 72nd Congress, 2nd Session, entitled "Investigation of Economic Problems", February 13-28, 1933. (See particularly pages 108-162 of the hearings) Also the Senate Committee held hearings of its own. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 73rd Cong., 1st Sess., entitled "Agricultural Emergency Act to Increase Farm Purchasing Power", March 17-28, 1933.

Compulsory Allotment Plan—This plan was first acted on by Congress in the 72nd Congress, 1st Session. See description above in this appendix under "72nd Congress, 1st

Session". It was included with modifications as an alternative feature of the Agricultural Adjustment Act as passed by the Senate but rejected in conference. The plan provided for payment to the farmer by purchasers of farm products of cost of production plus a reasonable profit, enforced by criminal penalties and a license system.

74th Congress, 1st Session:

Amendments to Agricultural Adjustment Act—The amendments pertinent to the present litigation were introduced in the House as H. R. 8052 on May 14, 1935, and reported to the House (H. Rept. 952) on May 15, 1935.

Following the decision in *Schechter Poultry Corp.* v. *United States,* decided May 27, 1935, 295 U. S. 495, this House bill was superseded by H. R. 8492, June 14, 1935, which was reported to the House (H. Rept. 1241) on June 15, 1935, and passed June 18, 1935. The Senate committee reported this bill with amendments. (S. Rept. 1011, July 3, 1935) The bill was amended and passed by the Senate July 23, 1935, an agreement reached in conference (H. Rept. 1757), and approved by the two Houses. The bill was approved by the President August 24, 1935. (Public No. 320)

See, also, pamphlet printed by the Committee on Agriculture and Forestry, U. S. Senate, for its use, entitled "Agricultural Adjustment Act—Constitutionality of the Agricultural Adjustment Act as amended by the Bill H. R. 8492", prepared by the Solicitor, Department of Agriculture.